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Supreme Court of the United States

EMIGRANT SAVINGS BANK,

Petitioner,

vs.

METAVANTE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. BEGLEITER
GARY J. MALONE
CONSTANTINE CANNON LLP
450 Lexington Avenue
New York, NY 10017
(212) 350-2700

DAVID BOIES
Counsel of Record
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

DAVID A. BARRETT
JOHN E. TOBER
MARILYN C. KUNSTLER
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

Attorneys for Petitioner

233168

QUESTIONS PRESENTED

1. Whether the Seventh Circuit, in conflict with the text of amended Rule 702 of the Federal Rules of Evidence, the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Company Limited v. Carmichael*, 526 U.S. 137 (1999), and eight other Circuits, improperly held that expert testimony founded solely on experience may be admitted without determining whether the testimony has a basis in sufficient facts or data, is the product of a reliable methodology or principle, and whether the methodology or principle was reliably applied to the facts of the case.

2. Whether the Seventh Circuit, in conflict with the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the law in two other circuits, improperly applied federal common law to a contractual attorneys' fee-shifting provision arising under state law, thereby increasing substantially the recoverable fee amount.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parent corporation of Petitioner Emigrant Savings Bank (now Emigrant Bank) is Emigrant Bancorp, Inc., which is wholly owned by New York Private Trust Corporation. Petitioner is not owned or controlled by a publicly-traded corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 619 F.3d 748 (7th Cir. 2010). The opinion is reproduced in the Appendix to this Petition (cited as "___a") at 1a.

The Seventh Circuit's opinion affirmed a June 3, 2009, oral ruling and later judgment of the District Court for the Eastern District of Wisconsin on the merits of the parties' claims, (78a), and an order granting the motion of Respondent Metavante Corporation for attorneys' fees, (55a). The district court further denied Petitioner Emigrant Savings Bank's motion to amend the judgment. (74a.) None of the district court's opinions and orders is reported.

JURISDICTION

The Seventh Circuit opinion was entered on August 30, 2010. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTES AND RULES INVOLVED

This case involves Rule 702 of the Federal Rules of Evidence ("Rule 702"), reproduced at 169a.

INTRODUCTION

This case, which involves a dispute over the adequacy of computer technology services provided under a contract governed by Wisconsin law, involves two important areas of federal jurisprudence: (1) the

standard for admitting experience-based expert testimony under amended Rule 702 of the Federal Rules of Evidence; and (2) the proper application of the *Erie* doctrine to interpretation of contracts governed by state law.

First, the Seventh Circuit held that an expert's testimony founded solely on experience was admissible under Rule 702 without considering whether the opinion was grounded on sufficient facts or data, utilized any reliable principles or methodologies, or reliably applied those principles and methodologies to the case. *Second*, in violation of the *Erie* doctrine, the Seventh Circuit applied federal common law to interpret a contractual fee-shifting provision governed by Wisconsin law, thereby awarding additional millions of dollars and denying the non-prevailing party any opportunity to challenge the reasonableness of the fees.

STATEMENT OF THE CASE

Factual Background

In 2004, Petitioner Emigrant Savings Bank ("Emigrant") and Respondent Metavante Corporation ("Metavante") executed a Technology Outsourcing Agreement (the "Agreement") under which Metavante agreed to provide hardware and software necessary to operate Emigrant's "direct bank," EmigrantDirect. A direct bank is an internet bank that enables consumers to open, fund, and service accounts online without visiting a physical bank branch.

The Agreement included a Performance Warranty requiring Metavante to "provide all Services in a commercially reasonable manner" except for limited aspects of Metavante's performance which were measured by numerical benchmarks called "Service Levels." (Seventh Circuit Separate Appendix of Defendant-Appellant ("SA") 64 § 6.1.)

As it turned out, Emigrant found that the services and products provided by Metavante and its subcontractors were defective, resulting in numerous, recurrent problems, many of which Emigrant resolved through its own efforts and additional expenditures. In September 2005, Metavante sued Emigrant in Milwaukee County Circuit Court for disputed unpaid fees under the Agreement. Under 28 U.S.C. § 1441 (b), Emigrant removed the action to the District Court for the Eastern District of Wisconsin, which had original jurisdiction pursuant to 28 U.S.C. § 1332.

Emigrant notified Metavante in May 2006 that it was terminating the Agreement for cause. (SA 92, 557-58.) Termination occurred in July 2006 when Emigrant transitioned off Metavante's technology. (SA 558-59.)

District Court Proceedings

Metavante's operative complaint alleged claims for breach of contract and for declaration of the amount due under the Agreement's termination provisions.[1] As to the latter, Metavante claimed that it was entitled to a

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[1] Metavante also sought a declaration that it was entitled to keep amounts previously paid.

termination fee of $20.7 million because Emigrant's successor direct banking system was not developed in-house, but rather used Metavante's confidential data and software. Emigrant asserted, however, that it had developed an in-house system and that the only termination fee due, if any, was for $3.8 million (the "In-House Claim").

Emigrant also counterclaimed, alleging, *inter alia*, that Metavante breached the Agreement, including the Performance Warranty, and fraudulently misrepresented its capabilities, causing Emigrant to lose thousands of customers, billions of dollars in deposits, and more than $200 million in value.

Following a non-jury trial, the district court ruled from the bench on June 3, 2009 (the "Oral Ruling," 78a-168a). As the Seventh Circuit noted, the district court "adopted, on a wholesale basis, a great quantity of [Metavante's] proposed findings [of fact], including complete sets of findings [of fact] and conclusions [of law] pertaining to certain claims." (14a.) The district court found for Metavante on all claims except the In-House Claim. On that claim, the court awarded Metavante the lower $3.8 million termination fee, almost $17 million less than Metavante had sought. (44a.)[2]

Emigrant moved to amend the judgment or, alternatively, for a new trial. Emigrant sought an amendment to reflect that the court found in Emigrant's

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[2] Additionally, the court awarded Metavante $2 million in unpaid processing fees and declared that Metavante could retain approximately $11 million in previously paid processing fees.

favor and against Metavante on the In-House Claim. The district court denied Emigrant's motion, which effectively foreclosed Emigrant from seeking attorneys' fees for its successful defense of the In-House Claim. (74a-77a.) Thereafter, the district court granted Metavante's petition for all of its attorneys' fees and costs, including fees relating to the In-House Claim, amounting in total to nearly $10 million. (55a.)

A. Expert Testimony

The district court's holding that Metavante did not breach the Agreement rested on its finding that Metavante provided services in a commercially reasonable manner as required by the Performance Warranty. (81a, 133a.) On that issue, the only witness presented by Metavante was its expert, David Moffat.

Prior to trial, Emigrant filed a motion *in limine* to preclude Moffat from testifying on the grounds that, *inter alia*, he was a business consultant and not a technology specialist, and therefore not qualified to opine on the proper functionality of technological services and products. Emigrant argued that his opinions were irrelevant, and that they were not based on any reliable methodology. (Dist. Ct. Dkt. No. 436.) In response, Metavante withdrew most of Moffat's expert report, leaving only section "C" in which he opined that Metavante met the Service Levels. The court did not rule on the motion *in limine* before trial.

At trial, Moffat opined, consistent with section "C" of his report, that Metavante met the Service Levels. In addition, however, over Emigrant's objections that

he was relying on withdrawn sections of his report, (*see* 21a), Moffat was permitted to testify that Metavante's overall performance was "commercially reasonable" "based upon the deposits obtained and the accounts opened" regardless of the system's defects. (SA 653.) According to Moffat, Emigrant met its business objectives, which Moffat assumed to be "obtaining further deposits from customers." (SA 225.)

During trial, Emigrant renewed its motion *in limine* objecting to Moffat's testimony on multiple grounds, including that it was without basis in any reliable methodology. (SA 632-33.) For example, Moffat testified that he was not an expert on technical issues, (SA 651), but that Metavante's services were commercially reasonable because, in his experience as a businessman, meeting business objectives meant a system worked. (SA 641.) Moffat also acknowledged that he did not consider numerous factors relevant to this opinion, such as interest rates, the number of failed applications, and internal Metavante documents acknowledging the deficient performance of its subcontractors. (SA 651-55, 661.) After trial, Emigrant moved to strike Moffat's testimony regarding commercial reasonableness on the same grounds. (Dist. Ct. Dkt. No. 534.)

In its Oral Ruling, the district court denied Emigrant's motion to strike in one sentence: "I find nothing in Moffat's opinions to run afoul of either Rule 702 or notice requirements to opposing counsel." (79a.) The court deemed all pending motions *in limine* to be moot. (112a; Dist. Ct. Dkt. No. 550.)

The court stated that while it found the expert testimony "instructive," it "does not control the day." (79a-80a.) Nonetheless, the court adopted *verbatim* Metavante's proposed Finding of Fact 66, which in turn relied exclusively on Moffat's testimony that "Metavante provided [s]ervices in a commercially reasonable manner in material conformance with the terms of the Agreement," (133a), because EmigrantDirect obtained substantial numbers of new accounts and deposits, (*see* 134a (Finding of Fact 71)). The court thereby used EmigrantDirect's business performance as a chief indicator of commercial reasonableness.

B. Attorneys' Fees

The Agreement, which is expressly governed by Wisconsin law,[3] contains two fee-shifting provisions. (SA 64, 71 §§ 5.5, 17.8.) The district court held that these provisions should be read together, and entitled the "prevailing party" to costs and reasonable attorneys' fees associated with the litigation. (59a.)

Although the district court ruled in Emigrant's favor on the In-House Claim, it held (purportedly applying Wisconsin law) that Metavante was the only "prevailing party" under the Agreement. The court stated that Emigrant was not a prevailing party because there was

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[3] Section 17.1 of the Agreement, (SA 70), provides:

> Governing Law. The validity, construction and interpretation of this Agreement and the rights and duties of the parties hereto shall be governed by the internal laws of the State of Wisconsin, excluding its principles of conflict of laws.

no "independent . . . claim" upon which Emigrant prevailed, but that Emigrant won only on a "partial defense." (62a.)

As to the amount of fees, the district court, relying on Seventh Circuit precedent, stated that "under the *Erie* doctrine, the method of quantifying a reasonable fee is a procedural issue governed by federal law." (64a (internal quotation marks omitted).) On that basis, and over Emigrant's objection, the court based its fee award entirely on summary amounts shown on Metavante's legal bills (often hundreds of thousands of dollars per month) even though Metavante—without claiming privilege—had removed from the version of the bills that it submitted all pages containing daily reports of individual time charges, descriptions of the work performed and who performed it. With no facts before it detailing the actual services of counsel, and again applying the law of the Circuit, the district court simply presumed that Metavante's fee request was reasonable based on market factors, principally that Metavante had paid the bills. (64a-72a.)

Seventh Circuit Proceedings

A. Expert Testimony

The Seventh Circuit held that the district court erred when it ruled in a single conclusory sentence that Moffat's testimony was admissible, since it had failed to conduct any analysis as to whether the testimony was relevant and reliable under *Daubert*. (17a.)

Faced with this clear error by the district court, the Seventh Circuit considered the admissibility issue *de novo.* In concluding that Moffat's testimony was admissible, the Seventh Circuit first determined that Moffat's testimony was relevant to the issue of commercial reasonableness. (17a.) The Seventh Circuit next found that Moffat's testimony was reliable, stating, "an expert's testimony is not unreliable simply because it is founded on his experience rather than on data; indeed, Rule 702 allows a witness to be 'qualified as an expert by knowledge, skill, *experience*, training, or education.'" (18a (emphasis in original).) The court said that Rule 702 requires that "the expert explain the 'methodologies and principles' that support his opinion; he cannot simply assert a 'bottom line.'" (18a-19a.)

The Seventh Circuit determined that Moffat's opinion that Metavante's services were performed in a commercially reasonable manner was not *ipse dixit* because Moffat claimed that his opinion was based on his experience. (19a.) In support, the Seventh Circuit cited to general statements Moffat made regarding past experiences, saying Moffat "suggested that the same perspective was appropriate in the present situation." (20a.) The court also noted Moffat's vague comparison that when he worked at the Bank of New York, he concluded that a system was "scalable" because assets grew significantly "not unlike [Emigrant's]." (20a & n.9.) Thus, the court based its reliability determination on Moffat's experience.

B. Attorneys' Fees

Emigrant argued on appeal that, under Wisconsin law, a party which defeats a significant portion of the recovery that is sought from it may be considered a "prevailing party"; that the district court did not perform a reasonableness review as required by Wisconsin law; and that the party seeking attorneys' fees must demonstrate the reasonableness of its fee request by submitting actual, unredacted bills.

Reviewing the meaning of the term "prevailing party" in the Agreement *de novo*, the Seventh Circuit held, without referring to governing Wisconsin law, that "[t]he term 'prevailing party' is a term of common usage" and "does not include, whether viewed in the abstract or in the context of this agreement, a party who has partial success on an affirmative defense." (45a.) According to the Seventh Circuit, Emigrant was not entitled to fees attributable to the "In-House Claim" because it was merely an "issue" and not a separate and distinct claim. (45a.)

The Seventh Circuit ignored Emigrant's argument that, under Wisconsin law, Metavante was not entitled to fees and costs attributable to the issue on which it lost regardless of whether Emigrant were considered a prevailing party.

As for the reasonableness of Metavante's fee request, the Seventh Circuit again ignored Wisconsin law, and applied its own rule of federal common law to hold that reasonableness may be presumed based on a consideration of external market factors without a

review of the actual unredacted bills. (51a-53a.) The court held that Metavante's legal bills were reasonable because (1) Metavante paid the fees, and (2) Metavante submitted affidavits indicating that it had negotiated the rates and reviewed the bills. (51a-52a.)

The Seventh Circuit affirmed the district court's decision to award Metavante attorneys' fees and costs based on redacted bills, holding that under *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 200 F.3d 518 (7th Cir. 1999), and its progeny, "individual scrutiny of line-item entries is neither necessary nor appropriate in contractual fee-shifting cases" to determine reasonableness. (51a.) The court did not address Emigrant's argument (raised in the district court and on appeal) that submission of redacted bills effectively prevents the opposing party from challenging reasonableness, as it is entitled to do under Wisconsin law.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS WARRANTED TO ESTABLISH THE PROPER STANDARD FOR ADMISSION OF EXPERIENCE-BASED EXPERT TESTIMONY UNDER AMENDED RULE 702

A. There Is a Clearly Developed Circuit Split over the Requirements for Experience-Based Expert Testimony

This Court has not had occasion to address Rule 702 since it was amended in 2000, and given the prevalence and importance of experience-based expert

testimony, the lower courts need guidance in how to apply the Rule in such cases. The decision below, while consistent with the Ninth Circuit's apparent view, is in direct conflict with the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits concerning the requirements for admission of experience-based expert testimony under amended Rule 702. *Compare Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004), *with Correa v. Cruisers, A Div. of KCS Int'l, Inc.*, 298 F.3d 13, 26 (1st Cir. 2002); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 132-33 (2d Cir. 2006); *United States v. Bynum*, 604 F.3d 161, 167-68 (4th Cir. 2010), *cert. denied*, 130 S. Ct. 3442 (2010); *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007); *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 296 (6th Cir. 2007); *United States v. Vesey*, 338 F.3d 913, 917 (8th Cir. 2003); *United States v. Nacchio*, 555 F.3d 1234, 1258 (10th Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 54 (2009); *and United States v. Frazier*, 387 F.3d 1244, 1259-61 (11th Cir. 2004).

The lax standard for admission applied by the Seventh and Ninth Circuits effectively conflates the separate requirements of Rule 702 that experts must be qualified *and* their testimony reliable. By contrast, the majority of circuits recognize that *all* of the requirements of Rule 702 must be strictly applied.

1. The Seventh Circuit Standard Conflicts with Rule 702, *Daubert* and *Kumho*

This Court last addressed Rule 702 in *Kumho*. In *Kumho*, a unanimous Court held that the trial judge's gatekeeping obligation to ensure that expert testimony is both relevant and reliable, articulated in *Daubert*, 509 U.S. at 589, extends to all experts, including experience-based experts. *Kumho*, 526 U.S. at 147.

Rule 702 was amended shortly after *Kumho* to reflect the *Daubert-Kumho* standard. Fed. R. Evid. 702 advisory committee's note. Amended Rule 702 requires that if an expert is "qualified . . . by knowledge, skill, experience, training, or education," then he or she "may testify" concerning:

> an opinion or otherwise, *if* (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, *and* (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (emphasis added). The plain text of the Rule requires *all* experts to meet *all three* elements. There is no carve-out for experience-based experts.

The Seventh Circuit held, however, that expert testimony may be reliable even when founded on "experience *rather than* on data" and failed even to refer to subparts (1), (2), or (3) of Rule 702. (18a (emphasis added).) In effectively disregarding the express requirements of the three subparts, the ruling below

does the opposite of what Rule 702 requires. Although experience may suffice to *qualify* an expert, Rule 702(1) expressly requires every expert to base his opinion on "sufficient facts or data." By holding that experience may *substitute* for data, the Seventh Circuit conflated the qualification requirement with the reliability requirement. In doing so, it effectively read subsection (1) out of the Rule.

Furthermore, the Seventh Circuit held that expert testimony may be considered reliable so long as "the expert *explain[s]* the 'methodologies and principles' that support [her] opinion." (18a-19a (emphasis added).) Anything more than asserting a "bottom line" will do. (19a.) That standard, however, grossly undermines the requirements of Rules 702(2) and (3), and eliminates the need for any actual analysis of reliability. It allows the court simply to accept an expert's self-serving "explanation," and ignores the second half of the equation: the court must scrutinize the expert's methodology, apply objective standards, and determine its reliability.[4] As the advisory committee's note to Rule 702 explains, even an experience-based expert must elucidate "*how* that experience leads to the conclusion reached, *why* that experience is a sufficient basis for the opinion, and *how* that experience is *reliably applied* to the facts." Fed. R. Evid. 702 advisory committee's note (emphasis added). By failing to require any

[4] Previously, the Seventh Circuit effectively ignored the reliable methodology requirement of Rule 702(2) by treating experience as a methodology. *See, e.g., United States v. Conn*, 297 F.3d 548, 557 (7th Cir. 2002) (examining only an expert's "earlier training and experience," when discussing the expert's "valid methodology").

meaningful scrutiny of the reliability of an experience-based expert's claimed methodology, or of whether the claimed methodology was reliably applied to the facts of the case, the analysis turns only on the expert's *ipse dixit*, eviscerating the second and third prongs of Rule 702.

Because Rule 702 was amended in response to *Daubert* and *Kumho*, the Seventh Circuit's standard also conflicts with those decisions. *See* Fed. R. Evid. 702 advisory committee's note. In *Daubert*, this Court held that for evidence to be relevant, it must bear a valid "connection to the pertinent inquiry"—that is, to the facts or data specifically relating to the case. 509 U.S. at 591-92. And in *Kumho*, the Court held that *Daubert*'s "reliability concerns may focus upon personal knowledge or experience," but even experience-based experts must employ "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." 526 U.S. at 150, 152. Thus, the trial judge must ensure the reliability of the experience-based expert's principles and methods by asking, for example, whether they are "of a kind that others in the field would recognize as acceptable." *Id.* at 151; *see also Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."). For the reasons discussed above, the decision below fails to apply these standards.

The Ninth Circuit has similarly ignored the express requirements of amended Rule 702, as well as *Daubert* and *Kumho*, in admitting experience-based expert

testimony. *See Hangarter*, 373 F.3d at 1018 (expert's testimony was admissible because his "experience, training, and education provided a sufficient foundation of reliability" even though his opinion "was not contingent upon a particular methodology or technical framework" (internal quotation marks omitted)).[5] Like the Seventh Circuit, the Ninth Circuit found qualification by experience alone sufficient for admissibility and disregarded the three subparts of Rule 702 added by the 2000 amendment.

2. Eight Other Circuits Apply a Stringent Standard in Keeping with Amended Rule 702

Most other circuits apply a much stricter standard to experience-based experts. The Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have expressly adopted the interpretation expressed in the advisory committee's note to amended Rule 702. *See, e.g.*, *Bynum*, 604 F.3d at 167 (4th Cir.); *Surles ex rel. Johnson*, 474 F.3d at 296 (6th Cir.); *Vesey*, 338 F.3d at 917 (8th Cir.); *Nacchio*, 555 F.3d at 1258 (10th Cir.); *Frazier*, 387 F.3d at 1260-61 (11th Cir.). These circuits require an experience-based expert to explain "how [her] experience leads to the conclusion reached, why [her] experience is a sufficient basis for the opinion, and how [her] experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee's note. The Seventh Circuit requires no such showing.

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[5] *But see United States v. Hermanek*, 289 F.3d 1076, 1093-94 (9th Cir. 2002) (noting, prior to *Hangarter*, that experience alone is insufficient, and requiring an explanation of the expert's methodology).

For example, in *Frazier*, the Eleventh Circuit held that experience, standing alone, does not render "reliable any conceivable opinion the expert may express." 387 F.3d at 1261 (emphasis omitted). Although the trial judge has discretion on how to evaluate reliability, "what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial." *Id.* at 1262. Even for experience-based experts, it "remain[s] the burden of the proponent" to explain "how that experience le[ads] to the conclusion he reached, why that experience [is] a sufficient basis for the opinion, and just how that experience [is] reliably applied to the facts." *Id.* at 1265 (citing Fed. R. Evid. 702 advisory committee's note). Experience alone is insufficient; otherwise, "the reliability prong would be, for all practical purposes, subsumed by the qualification prong." *Id.* at 1261. Yet that is precisely what the Seventh Circuit did here.

Similarly, in *Bynum*, the Fourth Circuit held that the trial judge must ensure that an experience-based expert's methodology is reliable even though it does not rely on the scientific method. 604 F.3d at 167 (citing *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007)). In *Bynum*, the district court vetted a photographic expert's methodology by identifying "exactly the steps he t[ook] in determining the authenticity of images." *Id.* at 168. This extensive analysis sharply contrasts with the cursory review allowed by the Seventh Circuit.

Although the First, Second and Fifth Circuits have not expressly adopted the test of the advisory committee's note, they require far more intensive

analysis than the Seventh and Ninth Circuits. *See, e.g.*, *Correa*, at 26 (1st Cir.); *SR Int'l*, 467 F.3d at 132-33 (2d Cir.); *Hathaway*, 507 F.3d at 318 (5th Cir.).

In *Hathaway*, for instance, the Fifth Circuit affirmed the exclusion of an experience-based forensic expert because he failed to employ a reliable methodology, stating that "the existence of sufficient facts and a reliable methodology is in all instances mandatory." 507 F.3d at 318. The expert's opinion lacked "specific factual support for the reliability of his initial assumptions." *Id.* Furthermore, he failed to explain whether his calculations were of "the kind normally used and accepted in forensic reconstruction." *Id.* Because he offered "little more than personal assurances based on his police experience that his conclusions are so," the testimony was inadmissible. *Id.*

Because the courts of appeals have developed sharply differing standards as to how amended Rule 702 applies to experience-based expert testimony, the admissibility of such evidence will turn on the circuit in which a case is tried. Guidance from this Court is essential to resolve this circuit split on an important and frequently recurring issue of federal law.

B. This Case Presents an Important Opportunity to Address Confusion Created by Amended Rule 702

The Seventh Circuit's ruling reflects an underlying tension between the discretion afforded to trial judges under *Daubert* and *Kumho*, the express requirements of Rule 702, and the inherently nonscientific quality of

experience-based expert testimony. This Court has emphasized that the *Daubert* inquiry is "a flexible one" in light of the "liberal thrust" of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 588, 594. Amended Rule 702, however, circumscribes the trial judge's discretion by adding three specific requirements that all expert testimony must meet—including experience-based testimony, which inherently lacks the indicia of reliability applicable to scientific testimony.

The Seventh Circuit's holding reflects the confusion caused by this underlying tension. Given the importance, prevalence, and intractability of this issue, this Court should resolve this tension and offer its guidance.

II. CERTIORARI IS WARRANTED TO CLARIFY *ERIE*'S "MURKY WATERS" CONCERNING APPLICABILITY OF FEDERAL COMMON LAW TO INTERPRET CONTRACTS GOVERNED BY STATE LAW

The Seventh Circuit supplanted both Wisconsin state law and the Agreement's choice-of-law provision by (1) using its own federal definition of "reasonable attorneys' fees"; (2) adopting an evidentiary presumption not recognized under Wisconsin law; and (3) ignoring Wisconsin's contract law definition of "prevailing party." The Seventh Circuit's approach violates *Erie* and conflicts with the law of the Tenth and District of Columbia Circuits, which specifically require the application of state law to contractual attorneys' fee provisions.

A. The Seventh Circuit Explicitly Acknowledges that Its Definition of "Reasonable Attorneys' Fees" and Its Evidentiary Presumption Are Creations of Federal Common Law

When considering reasonable attorneys' fees under a contract, the Seventh Circuit has adopted a test that requires the court to "assess[] [reasonableness] using the market's mechanisms." (52a (internal quotation marks omitted).) In practice, absent "special circumstances," fees must be awarded based on "the presumptive validity of market forces," which means that "[i]f the bills were paid, [it] strongly implies that they meet market standards" of reasonableness, without the need for "individual scrutiny of line-item entries." (51a-53a & n.22 (internal quotation marks omitted).) Given this evidentiary presumption, a party seeking to recover under a fee-shifting contract need only show that it negotiated its attorneys' rates in a reasonable manner and that it paid those bills while the status of fee-shifting was in doubt. (51a, 54a.) Once this showing is made, a presumption of reasonableness attaches, and the non-prevailing party has no ability to challenge the reasonableness of the specific fees at issue. (54a.)

This Seventh Circuit doctrine has developed over the course of some fourteen years in reliance solely on federal common law, without reference to state contract law principles. *See Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996) (first in this line of cases, and citing no relevant state law); *Medcom*, 200 F.3d at 520-21 (citing *Balcor*); *Kallman v. Radioshack Corp.*, 315 F.3d 731, 742 (7th Cir. 2002) (citing *Medcom* and *Balcor*); *Taco Bell Corp.*

v. Cont'l Cas. Co., 388 F.3d 1069, 1076 (7th Cir. 2004) (citing *Kallman*, *Medcom* and *Balcor*, and explicitly acknowledging that "none discusses Illinois law"); *Metavante*, 47a-51a (citing *Taco Bell* and *Medcom*).[6]

The Seventh Circuit acknowledges that it applies its federal common law doctrine even when the result under state contract law would be materially different. (*See* 51a & n.21 (acknowledging that the result in *Medcom*, which was decided under federal common law, would have been different had the court applied state law).)[7] Indeed, the Seventh Circuit applies its federal common law doctrine regardless of differences between the otherwise applicable state laws. (*Id.* (interpreting a contract governed by Wisconsin law)); *Taco Bell*, 388 F.3d at 1075-76 (applying the same rules to a contract governed by Illinois law).[8]

B. Wisconsin Contract Law Differs Substantially from Federal Common Law

The Seventh Circuit's application of federal common law produced a fee award that is potentially millions of dollars higher than Wisconsin law would allow. Among

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[6] The instant case is the first in this fourteen-year line of cases where certiorari is being sought, demonstrating both the continuing importance of the issue and the fact that it is ripe for this Court's review.

[7] It follows that the *Erie* issue is properly before this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court review is appropriate where "an issue . . . has been passed upon").

[8] The substance of Illinois law is discussed *infra* at 30.

other things, when determining "reasonable attorneys' fees" under contractual fee-shifting provisions, Wisconsin law requires determining "the amount [that the party claiming fees] actually recovered divided by the total amount of damages she sought to recover," and allowing the other party "that percentage of their attorney fees on which they were successful." *Shadley v. Lloyds of London*, 776 N.W.2d 838, 844 (Wis. Ct. App. 2009) (describing any other result as "neither reasonable nor just"); *see Custom Servs. Unlimited, LLC v. Marquette Warehouse, LLC*, No. 2009-AP-2103, 2010 WL 3769095 ¶ 10 (Wis. Ct. App. Sept. 29, 2010) (per curiam) (publication decision pending) (where "both parties succeeded in defeating the other parties' claim but neither party received the damages they sought[,] . . . neither party [was] entitled to fees" because a contrary result would be "unfair");[9] *Borchardt v. Wilk*, 456 N.W.2d 653, 657 (Wis. Ct. App. 1990) ("[T]he general rule is that where reasonable attorney's fees . . . [are] provided for in a note, . . . the amount recoverable for attorney's fees is reduced in proportion to the amount recovered on the note . . . .").[10]

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[9] The rule in the Seventh Circuit is that "[a]though . . . unpublished opinions do not bind Wisconsin courts" and may not be cited to them, *see* Wis. Stat. § 809.23(3), the court of appeals "consider[s] them persuasive indicators of how Wisconsin's highest court might decide [an] issue." *Shea v. Smith*, 248 F.3d 1159 (table), 2000 WL 1875733, at *2 (7th Cir. 2000). *See Mirbeau of Geneva Lake, LLC v. City of Lake Geneva*, No. 08-CV-693, 2010 WL 4260085, at *9 n.19 (E.D. Wis. Oct. 27, 2010) ("This court's local rules clearly allow . . . a citation . . . [to] unreported or non-precedential opinions . . . ." (internal quotation marks omitted)).

[10] Though there is no Wisconsin Supreme Court decision on point, the Wisconsin Court of Appeals has consistently applied this doctrine for two decades since *Borchardt*.

Wisconsin law further considers eight general factors including, *inter alia*, "the time and labor required," the "difficulty of the questions involved," and "the results obtained." Wis. Sup. Ct. R. 20:1.5; *see Aspen Servs., Inc. v. IT Corp.*, 583 N.W.2d 849, 851-52 & n.3 (Wis. Ct. App. 1998) (listing factors that "should be considered in determining the reasonableness of attorney's fees" under a contract and finding it appropriate to reduce fees for "excessive litigation").

Wisconsin's definition of "prevailing party" also follows from the determination of proportionate success and "reasonable attorneys' fees." *See Merrill Iron & Steel, Inc. v. Cullen-Smith, LLC*, No. 2009-AP-1203, 2010 WL 2757234 ¶¶ 14-15 (Wis. Ct. App. July 14, 2010) (per curiam) (unpublished) (considering both parties to be "prevailing" on a pro-rated basis when plaintiff achieved only partial success); *Sanfelippo Envtl. Constr., LLC v. Mewes Cos.*, 616 N.W.2d 922 (table), 2000 WL 665695 ¶¶ 15-16 (Wis. Ct. App. 2000) (unpublished) (holding that the parties "share[d] the status of 'prevailing party'—[plaintiff] at 20% and the [defendants] at 80%").

Finally, nowhere in Wisconsin law does any sort of presumption of reasonableness based on market factors appear. *See, e.g., Bettendorf v. Microsoft Corp.*, 779 N.W.2d 34, 41 (Wis. Ct. App. 2009) (noting that the party seeking fees has the burden of proof with no evidentiary presumptions).

In contrast, when interpreting the words "prevailing party" under the Agreement in this case, the Seventh Circuit applied its own understanding based on "common usage." (45a.) The court ruled that this

contract term "does not include, whether viewed in the abstract or in the context of this agreement, a party who has partial success on an affirmative defense." (45a.) Under this interpretation, Metavante was considered a prevailing party on 100% of the In-House Claim despite recovering only a fraction of the monetary relief it originally sought. Indeed, the court of appeals essentially interpreted the parties' contract as if it were governed by a federal fee-shifting statute such as 42 U.S.C. § 1988. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (§ 1988 requires a "generous formulation" such that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit" (internal quotation marks omitted)).

The Seventh Circuit's ruling thus violates Wisconsin's state law definitions of "reasonable attorneys' fees" and "prevailing party," which require consideration of enumerated factors, including a mathematical calculation of the proportion of success achieved.

In this case, the Seventh Circuit's failure to apply Wisconsin law cost Emigrant potentially millions of dollars in liability for legal fees. The In-House Claim on which Emigrant defeated Metavante's attempt to recover almost $17 million consumed a substantial part of the trial and significant discovery resources.[11] Had the district court applied Wisconsin law, Metavante's

[11] For example, the In-House Claim was discussed on 7 out of the 10 trial days; it was the subject of 28 of 98 transcript pages in Metavante's closing argument and nearly 10 of 38 transcript pages in the district court's oral ruling.

$10 million attorneys' fee recovery would have been significantly reduced.[12]

C. The Seventh Circuit's Application of Federal Common Law Violates the *Erie* Doctrine

1. The Contractual Definitions of "Reasonable Attorneys' Fees" and "Prevailing Party," and the Applicability of Evidentiary Presumptions, Are Substantive Issues Governed by State Law

This Court has recently noted that "murky waters" cloud some aspects of the *Erie* doctrine. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). It is clear, however, that "the federalism principle of [*Erie*]" is violated when federal courts "engender[] 'substantial variations in outcomes between state and federal litigation' which would 'likely influence the choice of a forum.'" *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (internal quotation marks, brackets, and ellipsis omitted)

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[12] Under the proportionality rule that Wisconsin law applies to contractual fee-shifting provisions, claims and counterclaims are considered independently without reference to their respective magnitudes. *See Custom Servs.*, 2010 WL 3769095 ¶ 10; *Shadley*, 776 N.W.2d at 843-44 (discussing proportionality review under *Borchardt* in situations with and without counterclaims). In addition, Emigrant is entitled to fees for the 80% success it obtained in limiting Metavante's recovery on the In-House Claim to $3.8 million of the $20.7 million sought. *See Sanfelippo*, 2000 WL 665695 ¶¶ 15-16 (apportioning attorneys' fees on a single claim for limited success).

(quoting *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965)); *see Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) ("[T]he twin aims of the *Erie* rule[] [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws." (internal quotation marks omitted)).

Under *Erie*, a law requiring courts to "review . . . the size of" a judgment is substantive, and must be applied by federal courts sitting in diversity, even if it does not create a "hard cap on the amount recoverable." *Gasperini*, 518 U.S. at 426. Indeed, "the factors a jury may consider in determining damages" are substantive and, hence, governed by state law. *Id.* at 429 (internal quotation marks omitted).

Here, the factors that Wisconsin courts consider in determining "prevailing party" and "reasonable attorneys' fees" substantially impact the amount that a prevailing party can recover. Moreover, in Wisconsin, a contractual attorneys' fee award is pegged to the degree of success obtained, which, once known, effectively creates a "hard cap" on the amount recoverable. It follows that *Erie* required the Seventh Circuit to apply Wisconsin law.

In addition, the Seventh Circuit's presumption that fees paid under market conditions are reasonable is effectively irrebuttable, making it unquestionably substantive as well. Despite the Seventh Circuit's token acknowledgment that "special circumstances may arise in which a district court will have reason to doubt whether market considerations alone were sufficient to ensure reasonable fees," no such circumstances have

arisen over the fourteen-year span of such cases. (53a.) Indeed, any such "special circumstance" would have to involve some sort of market dislocation, not a discrepancy in the fees themselves, because the Seventh Circuit allows complete redaction of all descriptions of work performed, making it impossible for a non-prevailing party to demonstrate unreasonableness inherent in the fee petition itself. (*See* 53a.) This lack of any record means that while "special circumstances" may prevent the market presumption from attaching, they can never defeat the market presumption itself. Thus, the Seventh Circuit's "rule of evidence" effectively represents "the implementation of a substantive rule of law." *See Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989).

Finally, the Seventh Circuit's evidentiary presumption, which shifts the burden of persuasion to the non-prevailing party to demonstrate unreasonableness, is a *per se* violation of *Erie*. *See Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 446 (1959) ("Under the *Erie* rule, presumptions (and their effects) and burden of proof are substantive . . . ." (internal quotation marks and footnote omitted)); *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) ("[W]e have held that in diversity cases the federal courts must follow the law of the State as to burden of proof . . . ."); *see also Shady Grove Orthopedic Assocs.*, 130 S. Ct. at 1469 (Ginsburg, J., dissenting) (citing approvingly to the Restatement (Second) of Conflict of Laws § 133 for the proposition that "[u]nder the rule of Erie[,] the federal courts have classified the burden of persuasion as to contributory negligence as a matter of substantive law" (internal quotation marks and ellipsis omitted)); *cf.* Fed.

R. Evid. 302 ("In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim . . . as to which State law supplies the rule of decisions is determined in accordance with State law.").

2. The Seventh Circuit's Use of Federal Common Law Will Lead to Forum-Shopping

Under *Gasperini*, courts considering *Erie* issues must ask whether "application of the [state law] would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would" violate "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 518 U.S. at 428 & n.8 (internal quotation marks, brackets, and ellipsis omitted)).[13] There are several reasons why, in violation of this standard, the Seventh Circuit's use of federal common law not only encourages forum-shopping, but also penalizes parties like Emigrant for exercising the right of removal.

First, avoiding an evidentiary burden is itself adequate reason to "cause a plaintiff to choose the federal court." *Id.* (internal quotation marks omitted).

Second, the Seventh Circuit's definition of "reasonable attorneys' fees," and its evidentiary presumption, undercut an important and express

[13] Here, the parties sought to avoid any question as to which law applied by agreeing that the contract would be governed by Wisconsin law. (SA 70.)

Wisconsin policy discouraging excessive claims. In Wisconsin, if a plaintiff has one strong argument, she is encouraged to pursue it without presenting weaker arguments because if she loses on the weaker claims she will have to pay the other side's fees. *See Shadley*, 776 N.W.2d at 844 ("[T]o entitle a plaintiff to the entirety of her attorney fees, even when the plaintiff is only nominally successful, would encourage a plaintiff to bring excessive and unsubstantiated claims, so long as at least one claim is legitimate."); *Sanfelippo*, 2000 WL 665695 ¶ 5 (noting that failure to apportion a fee award "would encourage frivolous claims and deter legitimate defenses"). By contrast, in the Seventh Circuit, the same plaintiff is encouraged to bring the weaker claims because victory based on the strong argument will allow recovery of *all* attorneys' fees.[14] Thus, in addition to upsetting the balance between State and Federal jurisdiction, the Seventh Circuit's rule actually undermines its own objective—conserving judicial resources—by encouraging excessive litigation. More importantly, the Seventh Circuit's policy encourages plaintiffs to choose federal court in preference to state court, contrary to the requirements of *Gasperini*. *See* 518 U.S. at 428 & n.8.

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[14] For example, Metavante's then-Executive Vice President and Chief Risk Officer testified that Metavante billed Emigrant for the larger termination fee (which Metavante then unsuccessfully sued to recover) despite "ha[ving] no knowledge one way or the other" as to whether Metavante was entitled to recover it. (SA 310-11.) Metavante also pursued, and received attorneys' fees for, claims as to which it did not present any substantial evidence at trial. (*See* 106a-107a.)

3. The Seventh Circuit's Justification for Applying Federal Common Law Is Unavailing

The Seventh Circuit addressed *Erie*'s application to fee-shifting contracts in *Taco Bell*, a precursor of the instant case. *See* 388 F.3d at 1076. The court in *Taco Bell* noted that Illinois law requires an attorneys' fees petition to specify the services performed and provide detailed records, and requires the party seeking fees to "prove that they are reasonable." *Id.* The court found, however, that Illinois law concerned only "the requirements of proof," and hence, like a decision whether or not to hold a hearing, the definition of reasonable fees and evidentiary standards were "matter[s] of procedure." *Id.* (internal quotation marks omitted).[15]

Yet the very state case that the court in *Taco Bell* cited in the foregoing discussion explains that, under Illinois law, determining reasonable attorneys' fees requires "consider[ing] a variety of . . . factors such as the skill and standing of the attorneys, the nature of the case, [and] the novelty and/or difficulty of the issues and work involved," among others. *Kaiser v. MEPC Am. Props., Inc.*, 518 N.E.2d 424, 428 (Ill. App. Ct. 1987). The court in *Taco Bell* not only failed to consider any of these factors, but it imposed an evidentiary presumption that it recognized did not exist under Illinois law. *See Taco Bell*, 388 F.3d at 1076.[16]

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[15] The court of appeals also briefly raised *Erie* at oral argument in this case, and its opinion referenced the *Erie*-based discussion in *Taco Bell*. (50a n.21.)

[16] In misapplying *Erie* in the instant case, the court of appeals, in addition to failing to consider the applicable factors (Cont'd)

The Seventh Circuit's characterization of the issue as one involving merely "the requirements of proof" is wrong. Such a characterization suggests that both the federal and state courts ask "are the fees reasonable?" and that the federal courts simply have a quicker way of answering the question. That is not the case. Both Wisconsin and Illinois courts have defined "reasonable" as a product of considering a number of specified factors that must be balanced against each other. Wisconsin courts then require an additional step involving a mathematical calculation to determine the extent to which a party has prevailed. *See Shadley*, 776 N.W.2d at 844. Both Wisconsin and Illinois also place the burden of proof on the party seeking fees without the benefit of an evidentiary presumption. *See Bettendorf*, 779 N.W.2d at 41; *Kaiser*, 518 N.E.2d at 428. The question, therefore, is not, as the court in *Taco Bell* suggested, one of *how* to prove, but one of *what* to prove and under *what burden* of proof, both of which under *Erie* require application of state law. *See Gasperini*, 518 U.S. at 428.

(Cont'd)
under Wisconsin law, ignored Wisconsin's requirement that "reasonable attorneys' fees" be proportional to the extent of the party's success. Indeed, the district court acknowledged that it was looking to federal law for more than merely evidentiary procedure, stating that "the *method of quantifying a reasonable fee* is . . . governed by federal law." (64a (emphasis added) (internal quotation marks omitted) (relying on another district court decision that interpreted *Taco Bell*).)

4. The Seventh Circuit's Use of Federal Common Law Directly Conflicts with the Law Applied in Other Circuits

At least two other circuits have reached the opposite result from the court below in applying *Erie* principles to contractual attorneys' fees cases, thereby creating a circuit conflict on an issue important to the fair and equitable administration of justice.

Most recently, the Tenth Circuit recognized that "Kansas courts apply a set of factors to determine the reasonableness of attorneys' fees, regardless of whether the attorneys' fees are awarded under a fee-shifting statute or a contract." *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1228 (10th Cir. 2009).[17] The court of appeals reversed the district court's fee award based on its "predict[ion] [of] what the Kansas Supreme Court would do." *Id.* at 1228-29. Shortly thereafter, the Tenth Circuit reconfirmed *Westar*, stating that its ruling "made clear

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[17] In *Westar*, 552 F.3d at 1227-29, the Tenth Circuit confined to its facts its earlier decision in *United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, 834 F.2d 1533 (10th Cir. 1987). *Western States* dealt with contracts governed by the Miller Act, where it is appropriate to use federal law to determine attorneys' fees. Prior to *Westar*, however, *Western States* had been cited in the Tenth Circuit as imposing on the party opposing a fee petition the burden of showing that the fees were inequitable, even when the contract was governed by state law. *See, e.g., Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1238-39 (10th Cir. 1999). Accordingly, while the Seventh Circuit continues to expand the application of federal common law to interpret all fee-shifting contracts, the Tenth Circuit has limited its use to contracts governed by federal law.

. . . that state law determines the attorneys' fees standard to be applied." *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1119 (10th Cir. 2009). In *J.R. Simplot*, the court reversed the district court for failing to "determine what standards Utah would apply to the attorneys' fee claim." *Id.* In further conflict with the Seventh Circuit, the Tenth Circuit treated evidentiary presumptions, and the definition of "reasonable attorneys' fees," as matters of substance, not procedure, under *Erie*.

Similarly, the District of Columbia Circuit has held that local law governs not only the definition of reasonable attorneys' fees, but also how that determination must be made. *See Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 150 (D.C. Cir. 1997) (even when the contract "creates a rebuttable presumption that [a specific quantum of fees is reasonable] . . . , the district court is obliged under District law to award only reasonable fees, with reasonableness a determination to be made by the judge" (internal quotation marks and brackets omitted)).[18] This conflicts with the Seventh Circuit's view that applies federal common law to create evidentiary presumptions, define "reasonable attorneys' fees," and shift determination of the reasonableness of the fee from the judge to the party seeking reimbursement.[19]

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[18] In addition, in *Accusoft Corporation v. Palo*, 237 F.3d 31 (1st Cir. 2001), the First Circuit applied Massachusetts law, noting that the state law "suggest[ed] that success [was] a factor that must be considered when fixing the fees to be awarded pursuant to a contractual provision." 237 F.3d at 61.

[19] *Ideal* also demonstrates the weakness of *Taco Bell*'s argument that the definition of "reasonable attorneys' fees" (Cont'd)

D. This Case Is an Appropriate Vehicle for Clarifying *Erie*'s "Murky Waters"

This case is an ideal vehicle for reviewing the Seventh Circuit's misguided application of *Erie*, developed in five cases over fourteen years. *First*, *Balcor*, *Medcom*, *Kallman*, and *Taco Bell* all considered contracts governed by Illinois law.[20] *Metavante* is the first in the line of cases to apply the same federal common law standard to another state's substantive contract law, thus refuting any claim that the Seventh Circuit simply misinterpreted Illinois law.[21] *Second*, *Metavante* is the first in this line of cases to explicitly approve redaction of billing statements, thereby making it impossible to satisfy the state contract law standard, and

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(Cont'd)
concerns only "requirements of proof." *Ideal* recognized that a federal court may not adopt a procedure—such as allowing redactions in fee petitions—that makes compliance with local substantive law impossible. *See* 129 F.3d at 151 ("[R]edaction of portions of the billing statements withholds . . . information essential to [the] effort[] to meet th[e] [District law] burden."); *see also TIG Ins. Co. v. Firemen's Ins. Co. of Wash., D.C.*, No. 08-CV-528, 2010 WL 2505878, at *34 (D.D.C. June 22, 2010) (discussing how *Ideal* impacts a non-prevailing party's discovery rights). Thus, the Seventh Circuit has effectively adopted a substantive rule under the guise of a discovery ruling.

[20] *See Taco Bell*, 388 F.3d at 1076 (acknowledging that *Kallman*, *Medcom*, and *Balcor* were, like *Taco Bell*, "diversity cases arising in Illinois, none [of which] discusse[d] Illinois law").

[21] Indeed, the Seventh Circuit has expressly held that state law does not apply in this context. *See Metavante*, 50a n.21; *Taco Bell*, 388 F.3d at 1076.

demonstrating that the Seventh Circuit's version of federal common law is not merely applying state law under a different name.

These two facts demonstrate that the Seventh Circuit will not desist from applying federal common law in violation of *Erie*, and that *Metavante* is the right case in which to review the Seventh Circuit's misguided doctrine. This conclusion is further reinforced by the very specific standards of Wisconsin law. The Wisconsin law requirement that fees must be mathematically prorated according to a party's success in recovering the damages originally sought stands in stark contrast to the Seventh Circuit's rule which provides, in substance, that "the fees were paid, so they must be reasonable." Moreover, the Seventh Circuit rule ignores Wisconsin's definition of "prevailing party." Both the Tenth and District of Columbia Circuits have recognized that state law must apply even where the difference between state and federal law is less significant.[22] *Metavante* thus represents further expansion of the Seventh Circuit's already overbroad misapplication of federal common law.

Contracts that contain fee-shifting provisions are numerous. The Seventh Circuit's refusal to apply *Erie* in such cases disregards the parties' choice of law provision in the Agreement, flouts an explicit state

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[22] *See Westar*, 552 F.3d at 1228 (noting that the state and federal standards were "not as different as [appellant] suggest[ed]," and used "essentially the same factors" but reversing the district court's decision because the federal and state rules differed on "who b[ore] the burden of proof on the question of reasonableness"); *Ideal*, 129 F.3d at 150.

policy discouraging excessive litigation and ignores the state's substantive contract law. *See Shadley*, 776 N.W.2d at 844. It will encourage forum-shopping, as well as increasing federal court encroachment on the states' rightful domain, *see Gasperini*, 518 U.S. at 428, in violation of fundamental principles of federalism.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

ROBERT L. BEGLEITER
GARY J. MALONE
CONSTANTINE CANNON LLP
450 Lexington Avenue
New York, NY 10017
(212) 350-2700

DAVID BOIES
Counsel of Record
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

DAVID A. BARRETT
JOHN E. TOBER
MARILYN C. KUNSTLER
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 30, 2010

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

Nos. 09-3007, 09-3996.

METAVANTE CORPORATION,
a Wisconsin Corporation,

Plaintiff-Appellee,

v.

EMIGRANT SAVINGS BANK,
a New York Corporation,

Defendant-Appellant.

Argued April 8, 2010.
Decided Aug. 30, 2010.

Before RIPPLE, MANION and TINDER, Circuit Judges.

RIPPLE, Circuit Judge.

Metavante Corporation ("Metavante") originally brought an action in Wisconsin state court against Emigrant Savings Bank ("Emigrant") for breach of contract. The case was removed to the district court, and Emigrant counterclaimed for breach of contract and

fraud. Following a bench trial, the district court entered judgment for Metavante on all claims.[1] Emigrant appealed.

While the appeal on the merits was pending, Metavante filed, in the district court, a petition for fees and costs pursuant to a fee-shifting provision of the contract. The district court granted the petition in full. We consolidated the appeal of the fee award with the appeal of the merits. For the reasons set forth in this opinion, we affirm the judgment of the district court.[2]

I

BACKGROUND

A.

Emigrant, founded in 1850, chose to expand its business by launching an on-line, direct bank, to be known as EmigrantDirect. Rather than develop the on-line system in-house, Emigrant decided to outsource this operation. Consequently, in 2004, it searched for a vendor to provide the on-line technology. Ted Morehouse, Emigrant's Senior Vice President of Marketing, testified that the bank's IT director, Dennis Healy, recommended Metavante, a vendor that provides electronic banking services and products to financial

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1. The jurisdiction of the district court was based on diversity of citizenship. *See* 28 U.S.C. § 1332.

2. Our jurisdiction is based on 28 U.S.C. § 1291.

institutions.[3] Mr. Healy offered to have someone from Metavante call Mr. Morehouse; consequently, Barry Holst made contact with Emigrant in February 2004.

In March 2004, Mr. Holst, along with others from Metavante, visited Emigrant. The Metavante team gave a PowerPoint presentation which referred to Metavante as "[t]he most complete offering of scalable, integrated solutions for financial services providers," and noted its ninety million accounts processed and nine billion financial transactions. Ex. 1063 at EMI-0014995.[4] As a result of this presentation, Mr. Morehouse was confident that he would not have to worry about volume-related system problems. The same PowerPoint, however, listed "Application processing/account opening (workflow)" as a "Related Project[ ]/Initiative[ ]" of Metavante. *Id.* at EMI-0015002. Mr. Morehouse testified that he did not recall asking what was meant by that term, although he did acknowledge that he knew that "certain applications" were still being developed and that he "was willing to live with it because [he] thought they would be completed and in place well before we launched." R.569 at 226. Mr. Morehouse admitted that he knew by June that on-line account creation did not "have some of the automation that we wanted." *Id.* at 204. He admitted,

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3. Emigrant also considered another company called Sanchez Corporation. Sanchez ultimately was not selected, in part because it outsourced a number of its functions.

4. The record contains two sets of exhibits. One set, Metavante's exhibits, is denominated "PX." The other, Emigrant's exhibits, is simply denominated "Ex."

however, that Emigrant "entered into the technology outsourcing agreement knowing that the online account creation was in a state of progress and would require further development for what Emigrant wanted." *Id.* at 209.

Metavante subsequently circulated a proposal. The proposal stated, in part, that "Metavante offers a truly integrated banking system, fully scalable to large volumes, yet modular in nature. This scalable platform processes nearly 90 million accounts each and every night." R.522 ¶ 22. According to Mr. Morehouse, the proposal's reference to existing clients that fit the direct bank profile and its general use of the present tense together indicated that Metavante's product already existed. The proposal also stated that "[o]n occasion Metavante has made the determination that purchasing niche products with advanced capabilities made more sense than developing these systems. However, even in these situations Metavante has made it a top priority to build integration into these products so that customers on the Metavante core applications can continue to enjoy the integration they expect." Ex. 1067 at EMI-0003078-79. Metavante offered as a reference another of its clients, Capital One, and Emigrant spoke to Capital One.

Over the next several months, Metavante and Emigrant negotiated a Technology Outsourcing Agreement ("the Agreement"). It was signed in August 2004. At some point in negotiations, Emigrant requested from Metavante a flow chart describing how the system

worked so that the information could be shared easily within Emigrant. Metavante provided this flow chart in July; it did not specify that its subcontractor, Teknowledge, would control one segment of the system. Mr. Holst never said anything to Mr. Morehouse "to disabuse [him] of [the] impression" that Metavante would not outsource. R.569 at 191. According to Emigrant's First Vice President John McNally, Emigrant learned in early October that Metavante outsourced part of its application to Teknowledge. R.570 at 122. According to a document from Emigrant's files, however, Emigrant knew about Teknowledge on September 14; the document in question stated that: "The customer validation pages and processing will be done through the Metavante 3rd party partner application, Teknowledge." Ex. 1134 at EMI-0025523; *see also* R.569 at 251-52.

B.

The Agreement required Metavante to perform certain services. These included "Electronic Banking Services," which enabled users "to access, receive, collect, concentrate, and/or report data and/or initiate transactions." PX 1, Agreement § 4.5.[5] Another service was "ACH Services," by which funds would be transferred. Agreement § 4.6. Section 3.1 of the Agreement, entitled "Performance by Subcontractors," provided in part that "[c]ustomer understands and agrees that the actual performance of the Services may

5. Hereinafter, we shall simply refer to the Agreement without referring to PX 1.

be made by Metavante, one or more Affiliates of Metavante, or subcontractors of any of the foregoing Entities."

The Agreement contained a performance warranty that required Metavante to provide "all Services in a commercially reasonable manner." Agreement § 6.1. The Agreement also provided that the availability of several of Metavante's services was to be evaluated according to service levels; for example, a service level of 98% availability meant that a given service had to be available 98% of the time. Anything covered by a service level was exempt from the performance warranty. Emigrant does not dispute the service levels; rather, its argument is that service levels measured only system availability. Emigrant contends that defects not resulting in outages of the system were not reflected in the service levels and were subject to the performance warranty.

The Agreement also contained a Termination Clause. Agreement § 8.2. This clause provided that a party may terminate the Agreement for cause, but also specified that the parties enjoyed broad rights to cure. Even if a default was not capable of cure within thirty days, the defaulting party could avoid termination by implementing a plan for cure. Moreover, the Agreement provided that failure to perform services as required could be cured by re-performance.

If Emigrant terminated for convenience, rather than for cause, the Agreement required that Emigrant pay a termination fee. The Agreement provided for a

reduced termination fee if Emigrant "migrate[d] its data processing for direct banking to an in-house solution." Agreement, Termination Fee Schedule, § 1(b). The Agreement also contained a fee-shifting provision. Agreement § 17.8.[6]

C.

EmigrantDirect launched in January 2005. The Online Account Creation service allowed consumers to *open* accounts, and was developed by Teknowledge, Metavante's subcontractor. The Consumer Electronic Banking service allowed consumers to *manage* accounts.

The EmigrantDirect system launched in January 2005 did not contain a "Good Funds Model." This Model checks the account balance against the desired transaction amount to ensure that the account contains sufficient funds to carry out the transaction. Without such a model, a customer can transfer more money than is available in his account. Eileen Lyon, Emigrant's First Vice President of Marketing, testified that the subject

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6. This provision provides:

> If any legal action is commenced in connection with the enforcement of this Agreement or any instrument or agreement required under this Agreement, the prevailing party shall be entitled to costs, attorneys' fees actually incurred, and necessary disbursement incurred in connection with such action, as determined by the court.

Agreement § 17.8.

of a Good Funds Model never had been discussed during the negotiations. Mr. Morehouse testified that he was comfortable launching without a Good Funds Model because he had been assured that Emigrant could work around the problem manually. R.569 at 272-73. A year before the contract was terminated, Metavante put in place a Good Funds Model at Emigrant's request.

EmigrantDirect had other flaws. According to Kimberly Romano, EmigrantDirect's Director of Operations, customers frequently received error messages and were unable to complete on-line applications, resulting in many calls to Emigrant's call center. Emigrant undertook mitigation measures, including sending paper applications to customers. The number of customer service representatives was increased from "[s]ix or eight" to "in the 50s." R.571 at 94. Emigrant also noticed that some transactions failed to process. *Id.* at 86-87. Emigrant's expert in computer science and software assurance, Roger Nebel, testified that Metavante failed to deliver its services in a commercially reasonable manner because its system was poorly integrated, poorly tested, poorly planned, not scalable and experienced degraded service. Ms. Romano testified that she "had never seen anything like this. The fact that things were identified, supposedly cured and they were recurring, just added insult to injury." *Id.* at 172. She also testified, however, that she believed Metavante employees were trying to be helpful and were themselves frustrated about the problems. *Id.* at 105.

Despite these problems, however, EmigrantDirect acquired over 250,000 new accounts and over $6 billion in deposits in under nineteen months. Mr. Morehouse testified that before launch, Emigrant did not know whether the system would be a great success or a complete failure that would result in his firing. Mr. Morehouse admitted, however, that Emigrant blew its projections "out of the water." R.569 at 257. He also admitted that Emigrant advertised its direct bank as the most successful direct bank in the country-a proclamation he believed to be true when made.[7] The district court likewise found that EmigrantDirect was "nothing short of a home run." R.545 at 19. Metavante's expert in the performance of financial technology services agreements, David Moffat, testified that Metavante's performance was commercially reasonable, and the "most compelling fact" supporting this assertion was "the level of deposits that were achieved on this system, the number of accounts that were opened, transactions that were involved here." R.575 at 237.

Emigrant contends, however, that this success is attributable to its mitigation efforts. Not only did it hire additional customer service staff, it also employed paper applications, performed identity validation and checked available balances before approving external transfers.

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7. During trial, Emigrant's damages expert, Paul Pocalyko, suggested that, despite a competitive advantage in interest rates throughout most of 2005, R.575 at 6, Emigrant's competitors earned a bigger market share than did Emigrant. *Id.* at 9. However, Pocalyko testified that Emigrant lost only one percent of the market due to Metavante's failures. *Id.* at 10.

Appendix A

D.

In September 2005, Metavante sued Emigrant in Wisconsin state court for nonpayment of fees. When Emigrant was served in November, it removed the case to the district court. Around this time, Metavante sent a letter to Emigrant, providing notice of impending termination of the Agreement for nonpayment. Emigrant responded by paying the requested amount in two installments. In letters accompanying the payments, Emigrant requested Metavante's assistance in effecting "the orderly transition of Metavante's services to Emigrant." Ex. 1338. Emigrant also objected to the payments and reserved its right "to pursue all claims against Metavante." *Id.* This action prompted Metavante to amend its complaint to seek a declaratory judgment affirming its right to the payments and, in the event of termination, the termination fee.

In March 2006, Metavante again provided notice of impending termination due to nonpayment. The Agreement was not terminated. On May 3, 2006, however, Emigrant informed Metavante that it was terminating the Agreement for cause, effective the weekend of June 17, 2006. In this letter, Emigrant stated that Metavante's services had been "flawed and inadequate from inception." PX 184 at MVNT001305. Specifically, the letter referenced "Metavante's inability to prevent deposit customers from overdrafting on their accounts," the "inability to process satisfactorily new account applications," Metavante's "continued and frequent service outages," and its inability to "determine

if or when a customer's deposit transfer request to an EmigrantDirect account has in fact been completed." *Id.* The letter also referenced "the obvious failure of Metavante personnel to understand their own system," *id.* at MVNT001306, and Metavante's refusal "to provide Emigrant with timely and accurate information with respect to outages and problems with its system," *id.* at MVNT001307. The letter made much of failures the system suffered over the New Year's holiday 2006 (affecting about 6,000 customers), as well as other, more recent defects affecting about 500 customers.

In July 2006, Metavante amended its complaint to reflect breach-of-contract claims for unpaid fees from April 2006 and later. Emigrant counterclaimed that Metavante had fraudulently induced Emigrant to enter into the contract, that Metavante had intentionally misrepresented its capabilities throughout the parties' relationship and that Metavante had breached its own contractual obligations. Later, Metavante contended that Emigrant had not developed an "in-house" system, which would have entitled Emigrant to a lower termination fee. Emigrant refers to this as the "in-house claim," even though it is not, strictly speaking, a distinct "claim."

The case was tried to the bench in May 2009. Following trial, the district court ruled for Metavante on all claims in an oral decision. In relation to Emigrant's allegations of fraud, the court emphasized that Emigrant did not raise its concerns with Metavante or otherwise "appropriately vet [ ]" them. R.545 at 13. The

court also stated that, although there had been "hiccups" in the relationship between Metavante and Emigrant, *id.* at 18, none amounted to a material breach of the contract. It emphasized the importance of EmigrantDirect's commercial success, the testimony suggesting that a good working relationship between the parties had existed and the remarks that Emigrant CEO Howard Milstein had made to his board of directors. *See infra* at II.C.1.a. The court also noted Metavante's pursuit of unpaid fees in late 2005, which led to discussions from which the court inferred that "the parties were headed toward a relationship that would result in the agreement being terminated not for cause but for the convenience of the parties." *Id.* at 21. On the issue of whether Emigrant migrated to an "in-house" solution, the court found for Emigrant and awarded the lower termination fee.

II

MERITS

We now turn to the merits of this case. We shall consider Emigrant's arguments about the applicable standard of review. Then, we shall discuss Emigrant's evidentiary arguments pertaining to expert testimony offered by Metavante. We next shall turn to the contract issues, considering first, whether the district court relied on the proper factors in determining whether Metavante breached the contract, and second, whether the court's conclusion on the matter was clearly erroneous. We shall also discuss whether Metavante breached the covenant

of good faith and fair dealing. We then shall turn to Emigrant's fraud claims and consider Emigrant's claim of fraudulent inducement before turning to its claim that Metavante intentionally misrepresented its failures during the contractual relationship.

A.

After a bench trial, we review conclusions of law de novo and findings of fact for clear error. *Johnson v. West*, 218 F.3d 725, 729 (7th Cir.2000). Provided that the trial court correctly states the law, we review for clear error the court's findings as to whether the facts meet the legal standard. Here, however, Emigrant contends that the district court's factual findings should be given no deference because they were adopted verbatim from Metavante's proposed findings and because they are internally contradictory.

We have expressed in the past our disapproval of the practice of a district court's adopting findings drafted by one party. *See W. States Ins. Co. v. Wis. Wholesale Tire, Inc.*, 148 F.3d 756, 759 n. 3 (7th Cir.1998). This view is not idiosyncratic to this court, but is a matter of federal judicial policy pointedly articulated by the Supreme Court of the United States. *See Anderson v. City of Bessemer*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Although we examine the district court's findings "especially critically" under these circumstances, they are still the findings of the court and are reviewed for clear error. *Doe v. First Nat'l Bank of Chicago*, 865 F.2d 864, 875 (7th Cir.1989) (internal

quotation marks omitted); *see also Anderson*, 470 U.S. at 572-73, 105 S.Ct. 1504; *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir.2006) ("[I]t is entirely consistent to review a district court's conclusions for clear error, while applying that standard of review with a careful inspection of the record.").

Upon examination of the record in this case, it is clear that the district court rejected some of Metavante's proposed findings and adjusted a few others, but nevertheless adopted, on a wholesale basis, a great quantity of the proposed findings, including complete sets of findings and conclusions pertaining to certain claims. Nevertheless, our reading of the district court's oral remarks does not suggest to us that the court blindly adopted the proposed findings. *Cf. Machlett Labs., Inc. v. Techny Indus., Inc.*, 665 F.2d 795, 797 & n. 4 (7th Cir.1981) (applying close scrutiny where district court adopted proposed findings of prevailing party without reading them). Rather, we believe that the court read the findings that it adopted and carefully considered them.

Emigrant points out two alleged contradictions between the district court's adopted findings and its oral ruling. These pertain to whether the court made a finding on damages and whether the court made a finding on Emigrant's use of Metavante's confidential information. However, neither of these two points are at issue in this appeal. Therefore, we need not decide whether the district court actually contradicted itself.

This case therefore is not analogous to *Mor-Cor Packaging Products, Inc. v. Innovative Packaging Corp.*, 328 F.3d 331, 334-35 (7th Cir.2003), where we were unable to determine the trial court's finding on the key point in the case-whether the contract at issue had been breached.

While we believe that the district court's treatment of this case is adequate, we pause to note that appellate courts and trial courts must go about their work with a concern for the overall accuracy and efficiency of the judicial process. The practice followed here, while having the superficial appeal of expediting the articulation of the district court's conclusions, creates a significant potential for inaccuracy at the trial level and great difficulty for a reviewing court that depends so much on the thoughtfulness and precision of the trial court's work product. This case involved a ten-day trial and over 500 docket entries. Oral remarks and wide-scale adoption of proposed findings hardly sharpens the issues in a way that conveys accurately the trial court's estimation to the appellate court.

B.

Emigrant challenges part of the testimony of one of Metavante's experts, David Moffat. It contends that the testimony was unreliable, irrelevant and beyond the scope of the disclosed expert report.

Moffat, a consultant employed with Huron Consulting Group, is experienced in financial services

technology and was tendered as an expert in "service levels performance and measurements in the financial services industry as well as the performance of financial technology services agreements." R.575 at 217. He testified that Metavante had performed its services in a commercially reasonable manner. In reaching that conclusion, he placed particular importance on "the level of deposits that were achieved on this system, the number of accounts that were opened, transactions that were involved," as well as Metavante's responsiveness to Emigrant's concerns and issues. *Id.* at 237.

Emigrant submits that Moffat's testimony about commercial reasonableness should have been excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under the rule established in that case, the district court was required to "ensure that the expert testimony at issue both rests on a reliable foundation and is relevant to the task at hand." *Trs. of Chicago Painters & Decorators Pension, Health & Welfare, & Deferred Sav. Plan Trust Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 787 (7th Cir.2007) (internal quotation marks omitted).

Ordinarily, we review a district court's decision to admit or exclude expert testimony for abuse of discretion. *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir.2010). Emigrant submits, however, that the district court's failure to perform any *Daubert* analysis should deprive its ruling of the usual deference.

We agree that the district court failed to perform a *Daubert* analysis. The court, in its oral ruling, stated only that "I find nothing in Mr. Moffat's opinions to run afoul of either Rule 702 or notice requirements to opposing counsel." R.545 at 2. Although we have held that the court in a bench trial need not make reliability determinations before evidence is presented, *In re Salem*, 465 F.3d 767, 776-77 (7th Cir.2006), the determinations must still be made at some point. Two of our sister circuits have held that *Daubert*'s requirements of reliability and relevancy continue to apply in a bench trial. *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir.2009); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed.Cir.2002). We have assumed the same. *Trs. of Chicago Painters*, 493 F.3d at 787. However, the usual concerns of the rule-keeping unreliable expert testimony from the jury-are not present in such a setting, and our review must take this factor into consideration. *See Attorney Gen. of Okla.*, 565 F.3d at 779. Nevertheless, the "court must provide more than just conclusory statements of admissibility or inadmissibility to show that it adequately performed its gatekeeping function." *Gayton*, 593 F.3d at 616.

Here, we must characterize the district court's statement as conclusory. We therefore must review the admissibility of the expert testimony de novo. After our review of the record, we conclude that Moffat's testimony was both relevant and reliable.

Moffat's testimony was relevant. Neither side disputes that whether Metavante's performance was commercially reasonable was at issue. However, there was significant disagreement as to whether Emigrant's commercial success is a legitimate factor in determining whether Metavante's performance was commercially reasonable, and Moffat's testimony spoke to that question. Moffat's testimony was designed to assist the court in assessing the reasonableness of Emigrant's assessment of Metavante's performance in a particular industry, financial services, during a transition to a new technology that would transform its way of doing business.

Moffat's testimony was sufficiently reliable to justify its admission. An expert's testimony is not unreliable simply because it is founded on his experience rather than on data; indeed, Rule 702 allows a witness to be "qualified as an expert by knowledge, skill, *experience*, training, or education." Fed.R.Evid. 702 (emphasis added); *see also Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000).[8] Rule 702 does require, however, that the expert explain the "methodologies and principles"

8. Criminal cases, for instance, are replete with examples of experts, such as police officers and informants, qualified by experience. *See, e.g., United States v. Goodwin*, 496 F.3d 636, 641 n. 2 (7th Cir.2007) (reiterating that "federal agents who have training and experience in drug-related transactions, crimes and prosecution are qualified to give expert testimony concerning the practices of those engaged in this type of activity" (internal quotation marks omitted)); *United States v. Gray*, 410 F.3d 338, 347 (7th Cir.2005) (DEA agent with 7 years experience,

(Cont'd)

that support his opinion; he cannot simply assert a "bottom line." *Minix v. Canarecci*, 597 F.3d 824, 835 (7th Cir.2010); *see also United States v. Noel*, 581 F.3d 490, 497 (7th Cir.2009) (rejecting expert testimony where expert "in essence, told the jury nothing more than, 'I am familiar with the definition of child pornography, and this meets that definition because I said so' "). Nor may the testimony be based on subjective belief or speculation. *Trs. of Chicago Painters*, 493 F.3d at 787-88.

Moffat's testimony cannot be characterized as mere *ipse dixit*. He did not simply testify that Metavante's performance was commercially reasonable because he said so. Rather, he explained that in the financial sector, as he has seen and experienced it, businesses consider technological innovation satisfactory if it enables them to meet their business financial objective.[9] These explanations were based on Moffat's experience in the

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(Cont'd)

5 as a narcotics canine officer, qualified as an expert); *see also United States v. Vesey*, 338 F.3d 913, 916-17 (8th Cir.2003) (holding that testimony of "a convicted drug trafficker and a confidential informant for law enforcement" should have been admitted as an expert "to present evidence of how illegal drug operations are normally conducted and to counter the testimony of the government's expert witness").

9. Moffat has acquired technologies on behalf of banks and negotiated servicing on behalf of technology firms. R.575 at 219. He testified that based on that experience, "the objective is essential," because technology is "built and deployed for the purposes of meeting a business objective." *Id.* at 238. "I'm not a

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industry, which included managing a fifty-person development team. R.575 at 275-76. In essence, Moffat testified that he was familiar with the manner in which financial services firms have evaluated technological innovations in the past and suggested that the same perspective was appropriate in the present situation. In his view, because Emigrant had met its business objectives, it should have considered Metavante's performance to have been satisfactory despite various operational problems that had arisen along the way. These "hiccups," R.545 at 18, as the district court referred to them, were to be expected along the way and should be tolerated in that industry as long as the bank's financial objectives were being realized. Therefore, Moffat's testimony based on the usual business practice is reliable.

Emigrant is, of course, critical of the quality of Moffat's testimony and does not believe that it ought to have been credited by the district court. These criticisms do not go to admissibility but to the appropriate weight that should be accorded to the evidence. As we noted in *Gayton*, "[d]etermination on admissibility should not supplant the adversarial process; shaky expert

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(Cont'd)
coder, I'm not a developer," Moffat testified, "but I'm [a] business man, in terms of my experience in this area, and the job got done." *Id.* at 250.

He also testified that when he worked for the Bank of New York, "as we saw our assets grow significantly, not unlike [Emigrant's], during the period I was there, we concluded that that was scalable, as I would conclude that this is scalable for the same reason." *Id.* at 245.

testimony may be admissible, assailable by its opponents through cross-examination." 593 F.3d at 616 (internal quotation marks omitted). The record demonstrates clearly that the district court was very much aware of this distinction and, although it admitted the evidence, it also made it very clear that, in the final analysis, it found it of limited utility in making a final determination in the case.

Emigrant also submits that Moffat's testimony about commercial reasonableness went beyond the scope of the disclosed expert report. Rule 26(a)(2)(B)(i) of the Federal Rules of Civil Procedure requires disclosure of a written expert report that contains "a complete statement of all opinions the witness will express and the basis and reasons for them." "The purpose of these [expert] reports is not to replicate every word that the expert might say on the stand. It is instead to convey the substance of the expert's opinion ... so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary." *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir.2009). They allow attorneys, not experts in the fields at issue, to prepare intelligently for trial and to solicit the views of other experts. *S.E.C. v. Koenig*, 557 F.3d 736, 744 (7th Cir.2009). We review the district court's ruling on a motion to exclude non-disclosed expert evidence for abuse of discretion. *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 640 (7th Cir.2008).

We are not confronted with a situation such as the one before us in *Ciomber v. Cooperative Plus, Inc.* where the expert clearly deviated from the established scope

of his expected opinion. 527 F.3d 635, 641-42 (7th Cir.2008). We believe that Moffat's supplemental expert report, combined with his original expert report, gave Emigrant sufficient information to allow it to prepare adequately for his testimony. The reports, when fairly read together, make it clear that Moffat believed that Metavante's level of performance should have satisfied Emigrant, given the level of financial success achieved by the venture.

Indeed, there is no better proof that the reports gave Emigrant adequate notice than the *very* able cross-examination of Moffat by Emigrant's counsel. Counsel stressed that Moffat was not a programmer, that Moffat did not consider "what percentage of consumers who tried to become Emigrant Direct customers were able to succeed," R.575 at 264, and that this information is a factor to consider in whether Metavante provided services in a commercially reasonable manner. *Id.* at 271. Counsel also explored Moffat's opinion on Metavante's internal communications and communications with Teknowledge, highlighting that Moffat's opinion was based on observations of others. *Id.* at 274-78. Moffat was asked to explain several of Metavante's communications, presumably to highlight what Emigrant saw as the incorrectness of Moffat's position. These lines of questioning make it clear that the district court did not abuse its discretion in determining that Emigrant had been adequately prepared for Moffat's testimony.

C.

We turn to Emigrant's contract arguments. Emigrant submits that Metavante breached the Agreement's performance warranty and its duty of good faith and fair dealing. We shall examine each of these contentions in turn.

1.

Metavante warranted that it would "provide all Services in a commercially reasonable manner." Agreement § 6.1. Although some aspects of Metavante's service were excepted from this warranty,[10] it applied to its provision of software and hardware and the design of the system.

a.

Emigrant contends that, in considering whether Metavante provided services in a commercially reasonable manner, the district court improperly relied on the performance of EmigrantDirect in the marketplace.[11] Our review of contract meaning is de novo. What is commercially reasonable is a question of

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10. Availability of the system was evaluated according to service levels, discussed *supra* at II.C.1.b.

11. Emigrant also contends that the district court "misinterpreted the Agreement's termination clause to impose on Emigrant a duty of reminding Metavante that it had a right to cure defects." Appellant's Br. in 09-3007 at 43. In light of our holding that Emigrant had no basis to terminate the contract, we need not address this argument.

fact. *See, e.g., Ford Motor Co. v. Lyons*, 137 Wis.2d 397, 405 N.W.2d 354, 376 n. 16 (1987) (under the UCC).

The district court did not commit any legal error in interpreting the contract language. As *Ford Motor Co. v. Lyons* illustrates, the term "commercially reasonable manner" is a commonly employed term in commercial transactions. 137 Wis.2d 397, 405 N.W.2d 354, 376 n. 16 (1987). The district court adopted the definition from Black's Law Dictionary of "a transaction conducted in good faith and in accordance with commonly accepted commercial practice." R.545 at 17. In giving meaning to this term, the district court certainly did not err in concluding that the success of the overall venture was relevant and probative evidence. True, the performance warranty addressed Metavante's provision of technology services, not overall business performance. Nevertheless, results in the area of technology services, while not conclusive proof of reasonable performance, are an indicator that the court is entitled to take into account in making its determination. A strong overall program performance, including commercial success, suggests that the program is performing in a reasonable manner. Although it is possible that mitigation efforts would produce an extremely strong overall performance despite poor component performance, a reasonable fact-finder is entitled to conclude that such mitigation efforts were not determinative and that the overall success of the venture is due to the quality of a major component's contribution. Therefore, although EmigrantDirect's commercial success cannot establish conclusively the commercial reasonableness of Metavante's performance,

the court certainly was entitled to consider it and to give this factor great weight.[12]

A fair reading of the district court's findings and oral ruling establishes, moreover, that the court considered EmigrantDirect's commercial success as just one factor, albeit a significant one, in its determination that Metavante's performance had been commercially reasonable. The court, although emphasizing EmigrantDirect's success, also discussed the cooperative nature of the Emigrant-Metavante relationship. It noted testimony that the sides "work[ed] together continuously to address issues." R.545 at 9. The court also recognized "what [Emigrant CEO] Mr. Milstein was telling his board of directors during this enterprise with Metavante." *Id.* at 18. The court noted that Mr. Milstein was asked about " 'some technological issues' " with EmigrantDirect and that " 'he responded that most of these issues had been worked out with Metavante.' " R.538 at 20. The court also noted that, in October 2005, Emigrant inquired about doing more business with Metavante. *Id.* at 21. These facts suggest that Emigrant itself believed Metavante's performance to be reasonable. The district court also noted that the contract referred to a 25% "abandonment rate" in calculating a reasonable price. R.545 at 13-14. The district court simply did not regard

12. We therefore cannot accept Emigrant's argument that, because, during contract negotiations, Metavante had refused to warrant EmigrantDirect's overall success, that overall performance is totally irrelevant to the court's determination of commercial reasonableness of Metavante's performance.

EmigrantDirect's success as conclusive proof that Metavante performed reasonably.

We must conclude that the district court was under no legal misapprehension and committed no methodological misstep in its consideration of this issue.

b.

Emigrant next contends that the district court's conclusion, that Metavante performed in a commercially reasonable manner and therefore did not breach the performance warranty, was clearly erroneous. *See Int'l Prod. Specialists, Inc. v. Schwing America, Inc.*, 580 F.3d 587, 594-95 (7th Cir.2009) (determination of material breach reviewed for clear error). In evaluating this contention, "[w]e do not reweigh the evidence or determine the credibility of witnesses." *Murdock & Sons Constr., Inc. v. Goheen Gen. Constr., Inc.*, 461 F.3d 837, 840 (7th Cir.2006).

The district court emphasized, in addition to Emigrant's commercial success, the testimony of William Scialabba and John McNally about the working relationship between the parties, as well as Mr. Milstein's statements to the Emigrant Board of Directors. The district court concluded that this evidence evinced no material breach on the part of Metavante. The court's findings emphasized Metavante's good-faith diligence "to address any issues that arose." R.538 at 19. The findings also noted that Emigrant even had inquired about doing additional

business with Metavante. *Id.* at 21. Further, the district court found that Emigrant had planned to terminate the Agreement for convenience well before the termination letter was sent. R.545 at 21. On the district court's view of the evidence, therefore, Emigrant had a product that was an outstanding commercial success, gave every indication that Metavante's performance was satisfactory, and enjoyed a good working relationship with Metavante-but nevertheless had planned to terminate the relationship, well before it actually attempted to do so. To the district court, these facts showed that Metavante's performance was commercially reasonable.

These findings are not clearly erroneous. They are supported by testimony from David Moffat, who suggested that, in the business world, technology is built with the business goal in mind. Emigrant used Metavante's technology to achieve its goal, as evidenced by the product's success. The findings were also supported by testimony that Metavante worked to fix problems as they arose. Mr. Milstein's remarks to the Board and Mr. McNally's interest in further business are evidence that Emigrant itself believed that Metavante was complying with its obligations. The record also provides evidence that Emigrant had long intended to terminate the Agreement. On September 27, 2005, the same day Milstein told the Board of Directors that most technological issues have been worked out with Metavante, he also told the Board that preparations were underway "to arrange for EmigrantDirect accounts to be managed within the

Bank next year." *See* PX 104 at EMI-0076814. In November 2005, well before the May 2006 termination letter, Emigrant inquired about developing "a plan to enable the orderly transition of Metavante's services to Emigrant" and noted that "time is of the essence." Ex. 1338.

The Agreement reveals that the parties understood that they were dealing with the application of a relatively new technology. Problems along the way were a possibility, but the parties were committed to quickly fixing these problems. The parties did not expect "reasonable" to mean "perfect" or "flawless." Section 8.2 of the Agreement specifies that, before a party may terminate, either party shall have 30 days to either cure a default or implement and "diligently carry-out" a plan to cure the default. That section also provides that

> any error in processing data, preparation or filing of a report, form, or file, *or the failure to perform Services as required hereunder* shall be satisfactorily cured upon the completion of accurate re-processing, the preparation or filing of the accurate report, form, or file, or the re-performance of the Services in accordance with applicable requirements, respectively.

Agreement § 8.2 (emphasis added). This contractual provision supports the district court's view that the parties expected that performance issues may arise, but

that they were committed to fixing them. Under its terms, diligent efforts to correct problems is a key factor to commercially reasonable performance. Evidence of the parties' working relationship, Emigrant's ultimate success, and Emigrant's inquiry about additional business serve to support the district court's conclusion in this case.

Emigrant invites our attention to the testimony of its expert, Roger Nebel, and on Metavante's internal documents. However, this evidence does not *compel* a contrary inference.

2.

Emigrant's second contractual claim is that the district court erroneously held that the implied covenant of good faith and fair dealing was not breached in this case. Emigrant emphasizes Metavante's internal documents and communications with Teknowledge, which are harshly critical of Teknowledge's performance. Emigrant contends that Metavante's failure to share these views with Emigrant breached the implied covenant.

Emigrant is correct that the implied duty of good faith and fair dealing is a part of the Agreement, just as it is a part of every other contract governed by Wisconsin law. *See Kreckel v. Walbridge Aldinger Co.*, 295 Wis.2d 649, 721 N.W.2d 508, 514 (2006). Although

"good faith" is a difficult term to define, Wisconsin courts have attempted to define "bad faith":

> "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."

Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 541 N.W.2d 203, 213 (1995) (quoting Restatement (Second) of Contracts § 205 cmt. d). It is, of course, possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract. *Id.* at 212.

The district court held that "Metavante did not have an 'implied' duty to notify Emigrant when a computer application used to provide Services under the Agreement experienced a problem or issue." R.538 at 54. The court also held explicitly that "Metavante did not breach any implied covenant of good faith." *Id.* Emigrant offers no reason to doubt these conclusions. The obligations of the parties to perform the terms of a contract must be evaluated in the context of the totality of the business arrangement contemplated by the contract. As we have noted earlier, the district court viewed the business arrangement here as a cooperative

effort to develop a technological innovation in the financial services industry. The arrangement contemplated the possibility of glitches along the way that would require a cooperative effort to address and to rectify. Overall availability was measured by service level benchmarks. The district court determined that Metavante diligently moved to address the imperfections that arose. That determination is supported by the record.

D.

We now shall turn to Emigrant's fraud claims. In Wisconsin, the elements of a cause of action for fraud in the inducement and for intentional misrepresentation are: (1) the defendant made a factual representation; (2) the factual representation was false; (3) the defendant made the factual representation knowing that it was untrue or without caring whether it was true or false; (4) the defendant made the representation with intent to defraud or to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied upon that statement to its detriment. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 283 Wis.2d 555, 699 N.W.2d 205, 211 (2005).

Appendix A

1.

a.

We first address Emigrant's claim of fraudulent inducement. Wisconsin has adopted the rule found in Restatement (Second) of Contracts § 166, which provides:

> If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, the court at the request of the recipient may reform the writing to express the terms of the agreement as asserted,
>
> (a) if the recipient was justified in relying on the misrepresentation....

See Hennig v. Ahearn, 230 Wis.2d 149, 601 N.W.2d 14, 26 (1999). Section 172 of the same Restatement is also pertinent:

> A recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

See Hennig, 601 N.W.2d at 27.

Appendix A

Emigrant contended at trial that Metavante had made certain misrepresentations prior to the formation of the Agreement-namely, that Metavante's system was a "proven model" that was "truly integrated" and "fully scalable to large volumes." According to Emigrant, the "proven model" claim was false because, at the time Metavante first had contact with Emigrant, Metavante had not yet made the decision to offer a direct bank and therefore had no product-certainly not a "proven model." R.578 at 139; Ex. 1081. Metavante, Emigrant claimed, did not have customers; it had one customer. The "truly integrated" representation was false, urges Emigrant, because Metavante employed a subcontractor, Teknowledge. R.578 at 143. The "fully scalable" representation was false because Metavante could not handle, as it claimed, 90 million accounts per day. R.578 at 158-59.

Emigrant now contends that the district court erred by holding that Emigrant could not rely justifiably on Metavante's alleged misrepresentations because it did not investigate them. The district court stated that "in the final analysis this is very much [a] two-way street; and as a consequence of the contract language such as it is, and such as that language was reviewed by individuals within Emigrant, they had as much an obligation to inquire as to whether de facto there would or were going to be used any subcontractors in fulfilling Metavante's contract obligations." R.545 at 10-11. Although the court here focused specifically only on the issue of subcontractors, it later made the more general point that Emigrant "has only itself to look to in terms

of these asserted deficiencies that have been catapulted, if you will, into a suggestion that there was fraud." R.545 at 13.

When these statements are assessed in the context of the findings of fact and conclusions of law, we believe that it is very clear that the district court's point was that, in light of the extensive pre-contract negotiations that took place in this matter, it was not reasonable for Emigrant to rely on any early sales pitch of Metavante; instead, Emigrant only could rely on the carefully negotiated terms of the final contract. Wisconsin law requires that a fraud plaintiff prove that his reliance is reasonable. *Kailin v. Armstrong*, 252 Wis.2d 676, 643 N.W.2d 132, 145-46 (2002). All the facts and circumstances, "including the intelligence and experience of the misled individual and the relationship between the parties," must be considered in determining whether this condition was met. *Bank of Sun Prairie v. Esser*, 155 Wis.2d 724, 456 N.W.2d 585, 589 (1990). When determining whether reliance is reasonable, the court essentially determines whether the plaintiff had the right to rely on the representations. *See Hennig*, 601 N.W.2d at 25 n. 3. Whether reliance was reasonable is ordinarily a question of fact.[13] *Sciano v. Hengle*, 1 Wis.2d 273, 83 N.W.2d 689, 692 (1957); *see also Cozzi Iron &*

13. In this case, the district court made conclusions of law suggesting that it was considering the issue as a matter of law. R.538 at 57. We believe it evident that if the court believed that Emigrant's reliance was unreasonable as a matter of law, it also believed that Emigrant's reliance was unreasonable as a matter of fact. We will evaluate the issue under the latter standard.

Metal, Inc. v. U.S. Office Equip., Inc., 250 F.3d 570, 574 (7th Cir.2001) (applying Illinois law); *McWaters v. Parker*, 995 F.2d 1366, 1374 (7th Cir.1993) (applying Indiana law). Here, two sophisticated businesses negotiated an arms-length transaction over a period of several months. R.522 ¶ 6, 25. Both sides carefully reviewed the Agreement. *Id.* ¶ 7. Emigrant was represented by both in-house and outside counsel, *id.* ¶ 27, and engaged the services of a firm called Core-Teck to conduct a "Risk Review and Analysis of Metavante Contract," *id.* ¶ 38. Emigrant submitted several comments and suggested changes to the Agreement. *Id.* ¶ 32. The Agreement provided that subcontractors may be used. Agreement § 3.1. Moreover, the Agreement contained specific availability guarantees-namely, service levels of 98%-and a broad performance warranty. R.522 ¶ 12, 14.

There is no provision in the contract that recites explicitly that "Metavante's services are unproven, not scalable and not integrated." However, the Agreement, combined with the circumstances of its negotiation, permitted the district court to conclude that any reliance on oral representations in this case was unreasonable. Wisconsin case law makes clear that

> "[c]ourts will refuse to act for the relief of one claiming to have been misled by another's statements who blindly acts in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary

> observation, not necessarily by search, he would have known. He may not close his eyes to what is obviously discoverable by him."

Ritchie v. Clappier, 109 Wis.2d 399, 326 N.W.2d 131, 134 (1982) (quoting *Jacobsen v. Whitely*, 138 Wis. 434, 120 N.W. 285, 286 (1909)). Here, the negotiation process made clear to Emigrant the capabilities of Metavante and the expectations of the parties were memorialized in a written instrument with an integration clause. Indeed, as a result of the negotiations, the parties drew up performance standards to serve as more precise benchmarks for Metavante's performance. Metavante's services were required to be available 98% of the time, and with respect to aspects of Metavante's performance other than availability, the parties agreed that Metavante was required to perform in a "commercially reasonable manner." Agreement § 6.1. These performance benchmarks addressed the same concerns as the alleged misrepresentations. Emigrant thus ensured that it would receive a desired level of service by negotiating for certain performance guarantees. Moreover, Emigrant was in a strong bargaining position. It did not agree to a mere form warranty that it had no power to change. It was able to request any additional assurances that it felt were needed.

Accordingly, we must conclude that the district court did not err in concluding that any reliance by Emigrant on the alleged misrepresentations of Metavante was not reasonable. The contract contained ample provisions that addressed the same concerns as Metavante's

earlier alleged statements. We already have held that these provisions were not breached.[14]

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14. The cases relied upon by Emigrant do not support its position. In *Hennig v. Ahearn*, 230 Wis.2d 149, 601 N.W.2d 14 (1999), there was an unacknowledged change in the final draft of the contract; most changes were highlighted and discussed by the parties as they passed drafts back and forth. The alleged misrepresentation was the failure to disclose this change; the court held that it was a question for the fact-finder whether reliance was reasonable. *Id.* at 24. The court only held that a jury *could* conclude that reliance was reasonable, not that a jury *must* so conclude. *Id.* at 24-25. Emigrant also relies on *First National Bank & Trust Co. v. Notte*, 97 Wis.2d 207, 293 N.W.2d 530, 539 (1980). That case supports our holding; it states that "[t]he recipient's fault in failing to discover the facts before entering the contract does not make his reliance unjustified *unless his fault amounts to a failure to ... conform his conduct to reasonable standards of fair dealing.*" *Id.* at 539 (emphasis supplied). We have held that, in view of all the facts and circumstances, the district court was permitted to find that Emigrant's reliance was not reasonable. Emigrant also relies upon *Lewis v. Paul Revere Life Insurance Co.*, 80 F.Supp.2d 978, 999 (E.D.Wis.2000). In that case, an insurance applicant allegedly failed to disclose certain matters on his application. The applicant contended that the insurer's reliance on the application was not justified because he had authorized the insurer to obtain his medical records, which would have disclosed the matters at issue. The court disagreed, noting that "[n]othing on the face of Lewis's application made obvious that there was any falsity to its claims that Lewis never had known indications of or been treated for mental or emotional disorder and that he had not received medical treatment or advice during the past five years." *Id.* at 999. By contrast, in the present case, the district court determined that Emigrant's participation in contractual negotiations addressed the issues of the alleged

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b.

We also note that, irrespective of the reliance issue, this fraud claim fails on other grounds. The district court determined that Metavante's claims that its product was "integrated" and "scalable" were not false. Indeed, the court adopted a finding stating that "Emigrant has failed to meet its burden of proving that the statements allegedly made by Metavante were both false and material." R.538 at 56. In its view, this case did not rise "to the level of even meriting serious consideration as a fraud claim" and that the fraud claim was "driven by the hard reality of one trying to avoid its contractual obligations that otherwise come into play and the Court has found applicable here." R.545 at 29. "[T]his is in the final analysis a breach of contract case...." *Id.* at 3. Additionally, as we have discussed earlier, the concepts of "integration" and "scaleability" were inextricably bound up with the issue of whether Metavante's

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early false representation and that Emigrant bargained for, and received, provisions in the arms-length contract that took any earlier representations into account. Finally, Emigrant derives no assistance from *Household Finance Corp. v. Christian*, 8 Wis.2d 53, 98 N.W.2d 390 (1959). That case holds that a bank was entitled to rely on the statements made on a loan application. It is true that the law does not require all recipients to examine critically, as a matter of course, representations made to them. *Id.* at 392-93. But the negotiation of a contract for services, which included performance benchmarks, by two sophisticated entities over a period of several months is a circumstance that is relevant to our analysis, and *Household Finance* is not to the contrary.

performance was commercially reasonable. Emigrant contended vigorously that Metavante's performance was commercially unreasonable because it was not scalable or well integrated. Therefore, when the district court made a determination on the question of commercial reasonableness, it was considering scaleability and integration.

The district court did not clearly err in this respect. Emigrant's own expert witness, Roger Nebel, testified that "integration" referred to putting together multiple parts in a way that works. R.571 at 210-11. "Scalable,"[15] according to the same witness, is "simply meant to indicate that the solution can grow in one or more of these dimensions," including new products, new volume or faster speed. R.572 at 5-6. As we have discussed earlier, there was ample evidence that Emigrant was satisfied with Metavante's performance and that Metavante's performance enabled Emigrant to achieve great success. To the extent Emigrant contends that Metavante represented that it would not use subcontractors, we note that section 3.1 of the Agreement, entitled "Performance by Subcontractors," allows for the use of subcontractors. This provision was obvious to Emigrant.

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15. The trial transcripts use a different spelling-"scaleable." The parties use what we believe to be the more correct spelling. We shall follow the parties throughout this opinion.

Metavante's alleged representations that its product was "proven," Appellant's Br. in 09-3007 at 34, present a slightly more difficult inquiry, because whether the product was "proven" is not directly related to the performance of the product. However, at the time Metavante approached Emigrant, Metavante had a client-Capital One. Metavante referred Emigrant to Capital One, and Emigrant spoke to Capital One. This consultation opportunity allowed Emigrant to evaluate for itself whether Metavante was sufficiently "proven." Emigrant could speak with Capital One and request additional references if not satisfied.

> "[C]ourts will refuse to act for the relief of one claiming to have been misled by another's statements who blindly acts in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known. He may not close his eyes to what is obviously discoverable by him."

Ritchie, 326 N.W.2d at 134 (quoting *Jacobsen*, 120 N.W. at 286).

2.

Emigrant also claims that Metavante intentionally misrepresented Teknowledge's adequacy throughout the Emigrant-Metavante relationship. The district court rejected this claim; Emigrant correctly points out that

the court did so with little comment.[16] Emigrant relies on Moffat's admission that "what Metavante said to Teknowledge and what Metavante said internally about Teknowledge's performance [that it was inadequate] was indeed different from what they told EmigrantDirect." Reply Br. in 09-3007 at 11. Emigrant also points to an instance in 2005 when "Metavante assured Emigrant after numerous problems ... that it had fully tested the capacity of its account opening system, while simultaneously warning that system's subcontractors that '[s]tress and performance testing has been inadequate: capacity planning appears nonexistent.' " Reply Br. in 09-3007 at 5. Specifically, Metavante told Emigrant that its system could handle 2,000 account openings per day, but told Teknowledge that the system was "inadequate to support solutions of the current scale." Ex. 1229 at MVNT-331122. Emigrant also appears to contend, if implicitly, that Metavante committed fraud when it failed to disclose Teknowledge's troubles.

We address only the claim that Metavante affirmatively made false statements about Teknowledge's capacities and abilities, telling Emigrant that Teknowledge's performance was adequate when it

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16. The district court found that, "[b]oth before and during the Agreement, Emigrant had knowledge and was aware of the facts and circumstances that form the basis of its claims for fraud in the inducement and intentional misrepresentation, and thus cannot prove those claims, let alone by clear and convincing evidence." R.538 at 56.

was, in reality, inadequate.[17] The district court's resolution of the contract claim and its remarks on the case's failure to "merit[ ] serious consideration as a fraud claim," R.545 at 29, make it clear that the district court found that Emigrant failed to prove that Metavante's representations that Teknowledge was adequate were false. We see no clear error in this determination for the reasons we stated in connection with the contract claim.

The district court committed no reversible error in determining that Emigrant's fraud claims were without merit.

III

FEES

We now turn to the fee petition filed by Metavante. First, we shall provide an overview of the facts of the fee proceedings. Next, we shall discuss whether Emigrant is entitled to fees on the "in-house claim." Finally, we shall turn to whether the district court properly allowed Metavante to submit redacted bills in support of its fee petition.

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17. Metavante had no duty to disclose defects in its system to Emigrant. This is so because, as we have stated, these defects did not amount to a breach of warranty, and Metavante attempted to fix these defects in good faith. *See supra* at II.C.2 (discussing implied covenant of good faith and fair dealing).

Appendix A

A.

Following the verdict, Emigrant moved to amend the judgment. Mindful that section 17.8 of the Agreement provided for the award of attorney's fees to the "prevailing party," Emigrant asked for amended findings that showed Emigrant to be the prevailing party on the "in-house claim." Emigrant stated that it was entitled to attorneys' fees relating to that aspect of the litigation and that Metavante was not entitled to its corresponding fees. R.553 at 3. The district court denied the motion. It held that there was no independent "in-house claim"; the "claim" that Emigrant so characterized was merely a partial defense. The court also stated that, "while [it] found that Metavante was entitled to an amount less than the full termination fee under the Agreement, the record is sufficiently clear on this point." R.556 at 3.

Subsequently, Metavante filed a petition for nearly $10 million in fees and costs. In support of the petition, it submitted redacted bills. The bills showed the amounts of time, rates, and money spent, but descriptions of work performed were redacted. Emigrant objected, arguing that redacted bills made reasonableness review impossible.

The court granted the fee petition in full. It held that under *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 200 F.3d 518 (7th Cir.1999), the aggregate fee amount requested by Metavante was reasonable. It considered the factors mentioned in *Medcom* in reaching this conclusion, noting, among

other things, that Metavante had paid its fees when the outcome of the case was uncertain and that the fees were not out of proportion to the stakes of the case. Because line-by-line analysis was foreclosed by *Medcom*, unredacted bills were not required.

B.

We now turn to Emigrant's argument for fees related to the "in-house claim."[18] The Agreement provided that, if Emigrant terminated for convenience rather than for cause, it would have to pay a termination fee. If Emigrant migrated to an "in-house solution," the contract provided for a lower termination fee. Agreement, Termination Fee Schedule § 1(b). Emigrant points out that Metavante sought a termination fee of approximately $20.7 million. The district court, however, awarded a much lower termination fee of approximately $3.8 million. Therefore, Emigrant contends that it was the "prevailing party" on what it calls the "in-house claim," entitling it to a portion of its legal fees.

Emigrant relies primarily on the fee-shifting provision of the Agreement. That provision states as follows:

> If any legal action is commenced in connection with the enforcement of this Agreement or any instrument or agreement required under this

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18. Metavante contends that Emigrant waived this argument by not submitting a fee petition of its own. However, Emigrant brought the argument to the court's attention in opposition to Metavante's petition.

> Agreement, the prevailing party shall be entitled to costs ... incurred in connection with such action, as determined by the court.

Agreement § 17.8. We review the meaning of the contract term, "prevailing party," de novo. *Tax Track Sys. Corp. v. New Investor World, Inc.*, 478 F.3d 783, 788 (7th Cir.2007). Here, the Agreement is unambiguous. The term "prevailing party" is a term of common usage in this context. It does not include, whether viewed in the abstract or in the context of this agreement, a party who has partial success on an affirmative defense. There was no separate and distinct "in-house claim" in the case; there was an in-house *issue*. Resolution of that issue caused Metavante to be awarded less damages than it had sought. We cannot accept Emigrant's argument that it is entitled to fees and costs attributable to litigation of this issue. The district court determined correctly that Emigrant's success on the in-house issue does not render it a "prevailing party" within the meaning of the contract. Emigrant left this litigation with nothing; in no sense is it the "prevailing party."

Emigrant also appears to contend that Metavante pursued the in-house issue in bad faith. It is well-settled that "a prevailing defendant may obtain attorneys' fees if the plaintiff litigated in bad faith." *Mach v. Will County Sheriff*, 580 F.3d 495, 501 (7th Cir.2009). The district court found nothing to indicate that Metavante pursued the issue in bad faith, and we see no basis for the reversal of that determination. Metavante argued at trial that the Agreement required that Emigrant's

successor system be developed fully in-house, without any outside assistance. The district court rejected this argument as a matter of contract interpretation. However, Emigrant advances no contention that this argument was frivolous.[19]

Metavante also argued that Emigrant had made use of Metavante's confidential information. As the district court noted, there was evidence showing that Emigrant was *in a position* to use confidential information.

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19. Metavante submitted in its closing argument that,

> [f]or Emigrant's successor system to be in-house, Emigrant and Emigrant alone under Section 1B had to create its own data processing platform for that system; not hire someone else to create it, not hire someone else to assist in creating it or to assist in creating some portion of it.

R.578 at 33. Section 1(b) of the Termination Fee Schedule provided:

> Notwithstanding the foregoing, if after the initial thirty-six (36) months of the term, Customer migrates its data processing for direct banking to *an in-house solution by creating their own data processing platform,* Customer may terminate this Agreement without payment of any Termination Fee.... This special termination option shall not apply in the event Customer acquires software from another source to replace the Metavante services described in this Agreement and enables it to run in-house.

Agreement, Termination Fee Schedule § 1(b) (emphasis added).

McNally testified that his job was to "explain[ ] away the functionality that we had in the Metavante system and try[ ] to make sure that we convert over everything that we needed to do into the in-house model." R.570 at 154. He also testified that he did a lot of reading and asked many questions in order to understand the "functionalities" of the Metavante system. *Id.* at 161-62. Notably, one of Emigrant's own experts, Dr. Stephen Garland of MIT, testified about the safeguards that are sometimes taken to avoid infringing on trade secrets and to avoid being sued for infringement. McNally testified, however, that no one was screened off of the in-house project and no one was directed not to use confidential information. R.570 at 235-36. This evidence provided a good-faith basis to pursue the in-house issue; the fact that Metavante ultimately was unable to prove, to the satisfaction of the district court, that Emigrant actually had used confidential information does not render it now liable for Emigrant's attorney's fees.

C.

Emigrant submits that *Medcom* did not permit the use of redacted bills; rather, unredacted bills were required in order to allow the district court to review the fee request for reasonableness.[20]

20. Metavante submits that Emigrant "never argued the *Medcom* line of cases supposedly requires the judicial examination of detailed attorney work entries that were indisputably submitted to, reviewed, and paid by the client in the ordinary course of business." Appellee's Br. in 09-3996 at 21. However, we believe that Emigrant's argument was fairly

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Appendix A

In *Medcom,* we confronted a request for attorneys' fees on the basis of an indemnity clause. We made clear that indemnity clauses contain an implied requirement that the fees sought be reasonable. *Medcom,* 200 F.3d at 520-21. The purpose of this requirement is "to guard against moral hazard-the tendency to take additional

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presented to the district court. Emigrant contended below that "a court should not dispense with an inquiry into the reasonableness of a fee request merely because the litigant paid its legal bills-the litigant must still justify the reasonableness of its requested fees and costs. This is so because, in reality, a party might choose to pay fees that are not commercially reasonable." Reply Br. in 09-3996 at FRA-12-13. Emigrant submitted that except for the fact that Metavante already had paid, "Metavante offers no other evidence by which Emigrant or the Court can meaningfully assess the reasonableness of Metavante's fees." *Id.* at FRA-14. Emigrant also specifically contended that "any showing of the reasonableness of Metavante's fees is impossible without detailed time records." *Id.* at FRA-16. These arguments are exactly the arguments that Emigrant now makes. Metavante is correct that Emigrant cited some inapposite cases and did not cite or address *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.,* 200 F.3d 518 (7th Cir.1999), but this fact does not work a waiver. A litigant may cite new authority on appeal. *See United States v. Rapone,* 131 F.3d 188, 196 (D.C.Cir.1997) ("In the present case, Rapone is not attempting to raise the issue of a jury trial for the first time on appeal. Rather, he simply offers new legal authority for the position that he repeatedly advanced before the district court-that he was entitled to have his case tried before a jury."); Fed. R.App. P. 28(j) (allowing counsel to bring "pertinent and significant" new authority to the attention of the court after brief has been filed). None of Metavante's cited cases establish that a failure to cite *cases* works a waiver.

risks (or run up extra costs) if someone else pays the tab." *Id.* at 521. We stated:

> If attorneys submit bills that meet market standards of detail, their omission of information to which courts resort in the absence of agreement is of no moment. If the bills were paid, this strongly implies that they meet market standards. The fees in dispute here are not pie-in-the-sky numbers that one litigant seeks to collect from a stranger but would never dream of paying itself. These are bills that MHC *actually paid* in the ordinary course of its business. The indemnity requires Baxter to make MHC whole, which means reimbursement for commercially-reasonable fees no matter how the bills are stated.

Id. at 520 (internal citations omitted; emphasis in original). We also said:

> Instead of doing a detailed, hour-by-hour review after the fashion of a fee-shifting statute, therefore, the district judge should have undertaken an overview of MHC's aggregate costs to ensure that they were reasonable in relation to the stakes of the case and Baxter's litigation strategy (plus the fact that this case was tried three times and appealed twice before). One indicator of reasonableness is that MHC paid all of these bills at a time when its ultimate recovery was

> uncertain. Another is that MHC's total legal fees and expenses came to about $200,000 less than Baxter's.

Id. at 521.

We further developed the *Medcom* principles in *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069 (7th Cir.2004). In that case, the appellant had submitted an affidavit, which we called "excruciatingly detailed," from a firm that reviews lawyers' bills; the affidavit stated that Taco Bell had overpaid its lawyers. *Id.* at 1075-76. We did not discuss the contents of the affidavit; we simply stated that, "[b]ecause of the resulting uncertainty about reimbursement, Taco Bell had an incentive to minimize its legal expenses (for it might not be able to shift them); and where there are market incentives to economize, there is no occasion for a painstaking judicial review." *Id.*[21]

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21. *Medcom* involved a contract that was governed by the law of Illinois. 200 F.3d at 519. However, our decision was not based on Illinois law. Indeed, even when fees are sought pursuant to a contract, Illinois courts require more exacting scrutiny: "[T]he petition for fees must specify the services performed, by whom they were performed, the time expended thereon and the hourly rate charged therefor." *Kaiser v. MEPC Am. Props., Inc.*, 164 Ill.App.3d 978, 115 Ill.Dec. 899, 518 N.E.2d 424, 427-28 (1987). Because of the importance of these factors, it is incumbent upon the petitioner to present detailed records maintained during the course of the litigation containing facts and computations upon which the charges are predicated. *Id.*

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Emigrant submits that the district court misapplied *Medcom* when it permitted Metavante to submit redacted bills. Emigrant focuses on our comments about "market standards of detail," *Medcom*, 200 F.3d at 520, to argue that, while "contracting parties have no basis to complain" "if summary bills without detailed time records are acceptable to and paid by clients," such bills were not accepted by Metavante in this case, Appellant's Br. in 09-3996 at 18.

Medcom and its progeny hold that, as a matter of the efficient and fair administration of the federal courts, individual scrutiny of line-item entries is neither necessary nor appropriate in contractual fee-shifting cases. Given the fact that the fees were paid by a party who had no reassurance of indemnity, we believed that market considerations normally would render unnecessary resort to the time-consuming examination of individual expenses. For the federal courts, such exercises drain the institution of its most valuable

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In *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069 (7th Cir.2004), we made explicit that *Medcom* was grounded in federal law and explained the reason. The issues involved were requirements of proof, which "concern how a particular court system, having regard for its resource constraints and the competing claims on its time, balances the cost of meticulous procedural exactitude against the benefits in reducing error costs." *Id.* at 1076. We cited cases holding that "[t]he decision to hold an evidentiary hearing when making an attorney's fee award is a matter of procedure." *Id.* (internal quotation marks omitted).

resource-time. As an alternative methodology, we stated:

> Instead of doing a detailed, hour-by-hour review after the fashion of a fee-shifting statute, therefore, the district judge should have undertaken an overview of MHC's aggregate costs to ensure that they were reasonable in relation to the stakes of the case and Baxter's litigation strategy (plus the fact that this case was tried three times and appealed twice before).

Medcom, 200 F.3d at 521. In *Taco Bell*, we reiterated this operating principle when the non-prevailing party submitted a detailed affidavit scrutinizing the prevailing party's fees. We did not examine this affidavit, stating that "where there are market incentives to economize, there is no occasion for a painstaking judicial review." *Taco Bell*, 388 F.3d at 1076.

Emigrant submits that allowing the submission of redacted bills effectively amounts to a prepayment standard-if the prevailing party has paid its legal bills, the opposing party must pay those costs. This result, in Emigrant's view, would vitiate the reasonableness requirement. In *Medcom*, however, we took the view that, in the normal course of adjudication, "reasonableness must be assessed using the market's mechanisms," 200 F.3d at 520, and that aggregate costs should be reviewed for reasonableness *in relation to*

certain other factors, *id.* at 521.[22] Of course, special circumstances may arise in which a district court will have reason to doubt whether market considerations alone were sufficient to ensure reasonable fees. In those instances, the district court, as a matter of its sound discretion, can require additional information of the parties. In such instances, of course, the court must proceed with due regard for the attorney-client privilege and for the protection of other confidential and proprietary information. Here, we are convinced that none of the concerns articulated by Emigrant were of such moment as to make it an abuse of discretion for the district court to decline to depart from the approach established in *Medcom.*

Here, the district court made the determination of reasonableness on the basis of not only the presumptive validity of market forces, but also the affidavits of the parties which assured the court that rates had been negotiated, supporting documentation had been reviewed and pertinent questions asked. The court also

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22. In *Medcom,* we referred to "bills that meet market standards of detail." 200 F.3d at 520. Our focus, however, was on the perspective of the prevailing party who received, reviewed and paid the bills. *See id.* ("If the bills were paid, this strongly implies that they meet market standards."). *Medcom* was referring to bills that met market standards of detail *in the form that the general counsel reviewed. Medcom* recognizes that the prevailing party's general counsel, or similar corporate officer, has a duty, imposed by various provisions of federal and state law, to scrutinize the bills before paying them; this is why it places great weight on the fact that the prevailing party paid the bills without assurance of repayment.

was faced with a situation in which the party challenging the fees as excessive had declined to reveal its own fees as a measure of a reasonable expenditure. Indeed, while criticizing Metavante for retaining an out-of-town firm to handle the trial, Emigrant itself proceeded with a comparable out-of-town firm of its own. Emigrant also makes much out of the fact that some legal costs were incurred by Metavante after it was aware of its status as the prevailing party. Given the district court's awareness of how Metavante's general counsel and its outside counsel had negotiated the fee arrangement, we believe that the court acted within the bounds of its discretion in determining that no additional guarantee of reasonableness was required.

General counsels, as corporate officers and as members of the bar, have a great responsibility to ensure that rates charged their client reflect the exercise of the highest standards of fiduciary duty; similarly, representations made to the court about fee arrangements must reflect exacting levels of candor. The judges of the district court have the responsibility-and the authority-to ensure that these standards are met. We only hold that in most situations, as here, this responsibility can be discharged without line-by-line scrutiny of submissions.

Conclusion

The judgment of the district court is affirmed.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED NOVEMBER 27, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CASE NO. 05-CV-1221

METAVANTE CORPORATION,

Plaintiff and Counterclaim-Defendant,

-vs-

EMIGRANT SAVINGS BANK,

Defendant and Counterclaim-Plaintiff.

ORDER

Nobody likes to pay a bill, especially when that bill belongs to someone else. However, a party must pay another's expenses when that party agrees in a legally enforceable contract to do so. In the present case, the defendant, Emigrant Savings Bank ("Emigrant"), pledged to pay the costs that the plaintiff, Metavante Corporation ("Metavante"), incurred during the litigation to enforce a contract between the two parties. The subject of this order is the nature and scope of the attorneys' fees and costs that Emigrant must pay. After a thorough examination of the appropriate case law and the records submitted by both parties, this court finds that Metavante is entitled to the full amount specified in its fee petition of $9,998,969.95.

Appendix B

BACKGROUND

It has been more than four years since Emigrant removed a case filed against it in a Wisconsin circuit court by the plaintiff, commencing the federal litigation in this matter. Metavante's suit alleged that Emigrant had breached the terms of a Technology Outsourcing Agreement ("Outsourcing Agreement") two parties entered into in August of 2004. In accordance with the relevant terms of the Outsourcing Agreement, Metavante agreed to provide Emigrant with the necessary services to allow the bank to implement "comprehensive banking products" and "electronic banking services." (Docket #79). In response to Metavante's complaint, Emigrant brought eight different counterclaims against the plaintiff stemming from Metavante's execution of the promises it made in the Outsourcing Agreement. (Docket #79). As the case involved complex issues and because hundreds of millions of dollars were at stake, an extensive period of discovery followed. For a majority of discovery, the Milwaukee law firm of Kravit Hovel & Krawczyk ("Kravit") represented the plaintiff. However, Metavante employed the Chicago based law firm of Kirkland & Ellis ("Kirkland") to champion the plaintiff's side during trial against the defendant's attorneys from the New York based law firm of Constantine Cannon ("Constantine"). While the court dismissed some of Emigrant's allegations before trial (Docket #115; Docket #426; Docket #492), all of Metavante's and a majority of Emigrant's claims proceeded for resolution via a trial. Accordingly, from May 4 through 14 and May

21, 2009, this court presided over a bench trial regarding the dispute between the two companies. Ultimately, the court found in favor of Metavante on all of its claims, and at the same time found against Emigrant on all of its remaining counterclaims. (Docket #550). As part of the court's judgment, this court ruled that Emigrant must pay Metavante's attorneys fees and costs, per the terms of the Outsourcing Agreement. However, the court granted Metavante leave to submit its fees, costs, charges, and disbursements. On July 30, 2009, Metavante submitted its fee petition (Docket #560) to which Emigrant objected to on September 17, 2009. (Docket #584). As such, after four years of intense litigation, the court has reached its final project in the protracted battle between Metavante and Emigrant: resolving the amount of attorneys fees and costs to which Metavante is entitled.

DISCUSSION

A. Determining Whether Metavante is Entitled to Attorneys' Fees and Costs

Before quantifying what fees and costs Metavante is entitled to, the court must determine whether Metavante *is entitled* to payment by Emigrant in the first place. Whether Metavante is entitled to reasonable attorneys' fees and costs pursuant to the Outsourcing Agreement is a question of substantive law. *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004). The Outsourcing Agreement itself provides in Section 17.1 that the law governing the "validity, construction,

and interpretation" of the contract and the "rights and duties of the parties" are the "internal laws of the State of Wisconsin, excluding its principles of conflict of laws." The default law in Wisconsin regarding whether a prevailing party can collect payment for its litigation expenses is the so-called American Rule that "parties to litigation are generally responsible for their own attorney fees incurred with respect to the litigation." *Re id v. Benz*, 2001 WI 106, ¶ 34 (Wis. 2001). However, Wisconsin law recognizes exceptions to the American Rule "where [a contract] provide[s] for fee-shifting." *Id.* While Wisconsin courts will "not construe an obligation to pay attorneys' fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides," *Hunzinger Constr. Co. v. Granite Res. Corp.*, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995), the primary goal in contract interpretation is to give effect to the parties' intentions when crafting the agreement based on what a "reasonable person would understand" the words of the contract to mean under the circumstances. *Danbeck v. American Fam. Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186 (2001). Moreover, Wisconsin courts have not hesitated in awarding to a prevailing party the "entire amount of fees and costs" of litigation if the unambiguous meaning of the terms of an agreement so provides. *See D.L. Anderson's Lakeside Leisure Co. v. Anderson*, 2008 WI 126, ¶101, 314 Wis. 2d 560 (2008).

Here, the language of the Outsourcing Agreement, read as a reasonable person would, unambiguously provides for cost and fee shifting to the party that

"prevails" in any litigation regarding the enforcement of the agreement's terms. First, section 5.5 of the contract broadly[1] states that Emigrant is required to "pay any collection fees, court costs, reasonable attorneys' fees, and other fees, costs, and charges incurred by Metavante in collecting payment of the charges and any other amounts for which [Emigrant] is liable under the terms and the conditions of [the] Agreement." More specifically, section 17.8 of the Outsourcing Agreement states that if "any legal action is commenced with the enforcement" of the contract that the "prevailing party" is "entitled to costs, attorneys' fees actually incurred, and necessary disbursement incurred in connection with such action, as determined by the court." Given the language of the parties' agreement, the court can conclude that the "prevailing party," as defined by Wisconsin law, is entitled to the costs and reasonable attorneys' fees associated with the litigation over the agreement.

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1. Emigrant contends that section 5.5 of the Outsourcing Agreement is the more "specific" of the clauses related to fees in the agreement. The court disagrees. Section 5.5 broadly outlines the "Terms of Payment," including one relevant line about potential costs that could arise in collecting payment under the agreement. Section 17.8 is devoted to the specific issue of "Attorneys' Fees and Costs" and discusses the rights of the parties if a "legal action is commenced in connection with the enforcement of the agreement." To the extent sections 5.5 and 17.8 conflict, the more specific section, 17.8, governs. *See Thomsen-Abbott Constr. Co. v. City of Wausau*, 9 Wis. 2d 225, 234, 100 N.W.2d 921 (1960) ("Where there is an inconsistency between a specific provision and a general provision, the specific provision controls.")

Appendix B

Both parties acknowledge that Metavante achieved success at trial and is entitled to some amount of fees and costs. However, Emigrant asserts that it should not have to pay the fees and costs associated with the litigation of Metavante's claim that it was entitled to the *full* termination fee amount under the parties' Outsourcing Agreement, as the court found that Metavante was entitled to an amount *less* than the full termination fee.[2] (Def.'s Br. 15). Emigrant warrants its claim in two ways. First, Emigrant contends that because section 5.5 of the Outsourcing Agreement provides that Emigrant must pay costs for which it is "liable" and because Emigrant was not found fully liable for the allegations it made regarding the development of "in-house" software, that the defendants should not have to pay for the costs related to that issue. However, Emigrant ignores the phrase "under the terms and conditions of the Agreement" when interpreting the meaning of section 5.5. That phrase indicates that Section 5.5 states a mere truism that Emigrant must pay the costs for which is it is found liable under the agreement. To determine what attorneys' fees and costs Emigrant is "liable" for, the court must refer to the more specific section of the Outsourcing Agreement that dictates when a party is entitled to payment of its litigation costs. That section, 17.8, states that a non-prevailing party is liable to the "prevailing party" for its attorneys' fees and costs. Emigrant attempts to

2. Emigrant refers to Metavante's attempt to receive the full termination fee via its accusation that Emigrant breached the Outsourcing Agreement by developing "in-house" software as the "In-House Claim."

interpret the different sections of the Outsourcing Agreement in isolation, but when construing the contract a court must "consider the contract as a whole" when attempting to give a "reasonable meaning to each provision." *Tempelis v. Aetna Cas. & Surety Co.*, 169 Wis. 2d 1, 9, 485 N.W.2d 217 (1992). Having done that, the court can conclude that the Outsourcing Agreement does not limit what attorneys' fees and costs can be afforded to a party beyond what the contours of section 17.8 specify.

Second, in the alternative, Emigrant contends that even if section 17.8 controls the issue of what attorneys' fees and costs Metavante is liable for that the plaintiff still cannot be considered the "prevailing party" on the "In-House" issue. Emigrant's argument warrants a brief look at what constitutes a "prevailing party" under Wisconsin law. In Wisconsin, to be a "prevailing party," it is not required that a party win a lawsuit in "all respects." *Wis. Seafood Co. v. Fisher*, 2002 WI App 134, ¶ 21, 255 Wis. 2d 833 (Ct. App. 2002). Instead, a party has "prevailed" if "he or she succeeds on any significant issue in the litigation which achieves some of the benefit sought by bringing suit." *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 539-40 (Ct. App. 1988) (defining "prevailing party" in the context of the Wisconsin Consumer Act); *see also Wis. Seafood Co.* 2002 WI App at ¶ 21 (defining "prevailing party as "the party to a suit who successfully prosecutes the action or successfully defends against it . . . even though not necessarily to the extent of his original contention" in litigation over the meaning of the phrase as used in a

contract); *In re Protective Placement of J.S.*, 144 Wis. 2d 670, 679 (Ct. App. 1988) (borrowing the definition for "prevailing party" from *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Where a party's claims "arise out of a common core of facts," a "losing party is not entitled to a reduction in attorney's fees for time spent on unsuccessful claims, if the winning party achieved substantial success and the unsuccessful claims were brought and pursued in good faith." *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 550 (Ct. App. 1991).

Applying this to the case at bar, Metavante is entitled to the litigation costs associated with the work devoted to the "In-House" issue. Metavante achieved "substantial success" at trial: the court found in favor of the plaintiff on both of the claims it set forth in its amended complaint. While Emigrant asserts that the In- House question was a separate issue and easily distinguishable from the rest of the case, as the court has noted in a previous order (Docket #556), Metavante never pleaded or otherwise presented to the court an "In-House Claim" as an independent damages claim. Instead, the issue was merely a partial defense that Emigrant presented on the question of the appropriate termination fee owed to the plaintiff. Just because Emigrant successfully persuaded the court to reduce the termination fee does not mean that Metavante failed to succeed on a significant issue in the litigation. Moreover, the "In House" issue was not easily separable from the rest of the litigation. The factual question of whether Emigrant developed its successor system in-house was one that related to broader issues in the case,

such as whether Metavante was entitled to a termination fee and several of Emigrant's counterclaims, as was evidenced by the witnesses at trial who spoke of both the "in-house" and non-in-house issues interchangeably in the same testimony. Finally, the court disagrees with Emigrant's assessment that Metavante's pursuit of the "In-House" issue was a "shot in the dark." While the plaintiff did not meet its burden in proving there was wholesale use of Metavante's processes by Emigrant, there is nothing to indicate that Metavante pursued the issue in bad faith or that the record was devoid of any evidence on the issue.[3] Because Wisconsin law only requires that a party succeed on a substantial issue in the litigation to be deemed a "prevailing party," *Radford*, 163 Wis. 2d at 550, and because Metavante has accomplished this feat, notwithstanding the fact that it was only awarded a partial amount of the termination fee it requested, Metavante is entitled to the reasonable litigation costs related to the In-House issue. Given this and given that Emigrant's only argument for why Metavante was not a prevailing party was the defendant's contention about the "In- House" issue, the court concludes that Metavante was the prevailing party

3. In fact, the court stated in its June 3, 2009 decision regarding the "In-House" claim that "there's just simply not sufficient detail" provided by Metavante on the issue. The court summed up the issue by declaring that "this is just one of those . . . dangling participles out there that I don't think in the context of this litigation we will ever get a good solid answer to." While the plaintiff may have not won the day on this particular issue, the issue was not brought in bad faith and the plaintiff still prevailed on the two claims it set forth in its amended complaint, making it a "prevailing party" under Wisconsin law.

and is entitled to reasonable attorneys' fees and costs associated with the litigation.

B. Quantifying Metavante's Reasonable Fees and Costs

The court proceeds to the second and potentially more complicated part of this order – determining the amount of costs and fees to award to the plaintiff. While the issue of whether a party is entitled to costs and reasonable attorneys' fees pursuant to an agreement is a matter of substantive law, under the *Erie* doctrine, the "method of quantifying a reasonable fee is a procedural issue governed by federal law in a diversity suit." *Oldenburg Group Inc. v. Frontier-Kemper Constructors, Inc.*, 597 F.Supp. 2d 842, 847 (E.D. Wis. 2009) (citing *Taco Bell Corp.*, 388 F.3d at 1077). The Seventh Circuit has provided this court with clear guidance for how to quantify "reasonable" attorneys fees and costs when a party is entitled to them pursuant to the terms of an agreement. Unlike in a *statutory* fee shifting case, in a *contractual* fee shifting case the nature and scope of a court's inquiry regarding what is a "reasonable" fee or cost is quite limited.[4] *Medcom v. Holding Co. v. Baxter Travenol Labs, Inc.*, 200 F.3d 518,

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4. Emigrant quotes at great length in their brief to the court from Seventh Circuit precedent requiring the prevailing party to detail the costs it requests and the court to take a very active role in monitoring the costs. However, the cases cited as authority by Emigrant uniformly are in the context of a court awarding attorneys' fees because of a fee shifting *statute*, not a fee shifting *contract*. Under the Seventh Circuit's rules in a

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520 (7th Cir. 1999). Instead of engaging in a "line-by-line analysis" of the different costs proffered by the prevailing party, the standard guiding the court when it is determining the appropriate amount of attorneys' fees and costs as required by a contractual arrangement is "commercial reasonableness." *Balcor Real Estate Holings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996).

The Seventh Circuit has provided several factors that a court can consult to determine whether the fees and costs requested by a prevailing party are commercially reasonable. The *Balcor* court noted that the "best evidence of the market value of legal services is what people pay for it." *Id.* If the fees in dispute were "actually paid in the ordinary course of . . . business,"

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contractual indemnification case, "a district court will not normally engage in a detailed, hour-by-hour review of the lawyers' bills, as it might do when quantifying reasonable attorneys' fees pursuant to a feeshifting statute." *Oldenburg Group Inc. v. Frontier-Kemper Constructors, Inc.*, 597 F.Supp. 2d 842, 847 (E.D. Wis. 2009); *see also Rexam Bev. Can Co. v. Bolger*, No. 06-c-2234, 2008 U.S. Dist. LEXIS 96563, at * (N.D. Ill. Nov. 25, 2008) ("The parties' briefing of this issue is not particularly helpful, as both sides rely heavily on cases interpreting federal fee-shifting statutes rather than contractual fee provisions, which are analyzed differently.") In fact, the *Medcom* court admonished the district court in that case for itemizing and scrutinizing the costs requested by the prevailing party, the exact same behavior in which the defendant invites this court to participate. *Medcom*, 200 F.3d at 521. The court will decline the defendant's invitation.

strong evidence exists that what the prevailing party is requesting is commercially reasonable. *Medcom*, 200 F.3d at 520; *see also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("[if] counsel submits bills with the level of detail that paying clients find satisfactory, a federal court should not require more"); *Oldenburg Group Inc.*, 597 F.Supp 2d at 847 ("[S]o long as the bills are real bills that the party seeking indemnification actually paid in the ordinary course of business without knowing for certain that it would be able to shift fees to its adversary, the district court should find that the bills are commercially reasonable.") In addition, *Medcom* stated that if the bills are paid at a time when ultimate recovery is uncertain, reasonableness is further indicated. *Medcom*, 200 F.3d at 521. Another gauge for reasonableness is the relationship between the aggregate costs and the stakes of the case and the opposition's litigation strategy, in that, for example, requesting relatively high costs and attorneys' fees in a small stakes case would likely be commercially unreasonable. *Knoll Pharm. Co. v. Auto. Ins. Co.*, 210 F. Supp. 2d 1017 (N.D. Ill. 2002) (citing to *Medcom*, 200 F.3d at 521). The Seventh Circuit has also noted that where a prevailing party's "corporate inside counsel monitor bills submitted by outside counsel" and those bills are paid, reasonableness can be inferred. *Balcor*, 73 F.3d at 153. In addition, *Medcom* indicates that the amount of fees incurred by the opposing party is a factor to be considered in determining the reasonableness of a fee award. *Medcom*, 200 F.3d at 521. Overall, the court must look at these various factors, keeping in mind that the court's responsibility is to guard against moral

hazard, "the tendency [by a prevailing party] to take additional risks or run up extra costs if someone else pays the tab." *Id.*

Applying the commercial reasonableness standard to the case at hand, the court holds that the attorneys' fees and costs that Metavante submitted with its fee petition are reasonable, and, as such, the plaintiff is entitled to the full amount specified in its fee petition. Several facts underlie the court's conclusion. First, as the "best evidence of the market value of legal services is what people pay for it," *Balcor*, 73 F.3d at 153, the court initially notes that Metavante has presented to the court thousands of pages of "real bills" that Emigrant concedes that the plaintiff actually paid. *Id.* After an extended examination of the bills the plaintiff has presented, the court can conclude that "counsel [has] submit[ted] bills with the level of detail that paying clients find satisfactory."[5] *In re Synthroid Mktg. Litig.*, 264 F.3d at 722.

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5. Although a protracted discussion about each bill is not an appropriate task for this court to undertake given the directives of *Medcom*, the court will note that all of Metavante's bills provide the amount of money charged to the company and the amount of time devoted by each expert or attorney toward the matter. While several of the older bills, particularly those from Kravit do not detail how each attorney utilized the time he or she charged Metavante for, the court notes that not only were these bills paid well before final judgment, implying a minimal risk of the "moral hazard" problem arising, the defendant has not provided any reason to doubt that the bills are atypical of those incurred by parties in high stakes litigation like the present case.

However, while the fact that "bills were paid" is a strong indication of reasonableness, "the inquiry does not necessarily stop there." *Knoll Pharm. Co.*, 210 F. Supp. 2d at 1017. The court is also persuaded that Metavante has paid all of its bills without being "certain" of the fact that it would be reimbursed for its litigation costs. *Oldenburg Group Inc.*, 597 F. Supp 2d at 847. While Emigrant protests that some of Metavante's bills were paid after its victory in this court, Emigrant's appeal is still pending in this case, making Metavante's chance of recovering the costs of litigation less than certain. *See Balcor*, 73 F.3d at 153-54 (allowing payment for appellate litigation costs in a contract that entitled the prevailing party to full compensation for the legal outlays it incurred). Moreover, at the hearing on June 3, 2009, Emigrant's attorney's asserted that they had "prevailed" on a major issue, an implied concession that Metavante's payment of its litigation costs was not done with the certainty that the plaintiff would be reimbursed. (Docket #545 at 36 - Transcript, Decision).

In addition, the court finds that the relationship between the potential stakes in the case and the litigation costs is not so out of proportion such that the costs requested are unreasonable. The defendant's counterclaims in this case made the stakes of the litigation immense, as Metavante would have been forced to pay hundreds of millions of dollars in damages as a result of an adverse judgment. The plaintiff has directed the court to several cases that indicate that the litigation costs requested in this case are not out of proportion. *See, e.g., Oldenburg Group Inc.*, 597 F. Supp

2d at 847 (finding that more than $300,000 in fees was reasonable given the $10 million dollar claim). Moreover, the defendant has not provided the court with any authority indicating that the litigation costs requested by the plaintiff are disproportionate when compared to the potential damages facing Metavante.

Moreover, the court is confident that the "moral hazard" problem is not at risk in this case. The plaintiff negotiated and received discounts on its legal services from both Kravit and Kirkland, hardly the actions of a party that was trying to "run up" the litigation cots in anticipation of the non-prevailing side paying its bills. The plaintiff also has demonstrated that its corporate counsel, a Metavante executive who, beyond his own ethical duties as an attorney, had fiduciary duties to the corporation's board of directors and shareholders, scrutinized and monitored Metavante's legal bills and deemed them to be commercially reasonable, providing further evidence that Metavante is entitled to the amount it requested in the fee petition. *Balcor*, 73 F.3d at 153.

Perhaps most damaging for Emigrant is their failure to disclose any of the costs and attorneys' fees incurred by themselves in this litigation, which would provide a strong basis to gauge the reasonableness of Metavante's fee petition. While Emigrant is not required to disclose their own costs to demonstrate the unreasonableness of Metavante's costs, the defendant's silence on this issue is more than deafening. Seventh Circuit case law amply demonstrates that one of the best ways to

demonstrate commercial unreasonableness is by comparing each parties' respective legal fees. *Medcom*, 200 F.3d at 521 (finding that the prevailing party was entitled to full indemnity, in part, because the prevailing party's litigation costs were less than those of the non-prevailing party). The defendant's silence coupled with the plaintiff's evidence that the fees charged by its Chicago attorneys are comparable with the fees charged by the defendant's New York based attorneys in other, similar litigation, persuade this court that the costs incurred by Metavante during this litigation were commercially reasonable.

Emigrant raises several arguments contesting this court's conclusion. First, the defendant argues that the rates charged by the plaintiff's attorneys were not reasonable given the forum in which the litigation occurred. However, an inquiry into what costs are reasonable in a given forum is inappropriate under the standard of review articulated in *Medcom:* all that is required under Seventh Circuit case law is that the fees and costs were actually paid, which the plaintiff has demonstrated. *Medcom*, 200 F.3d at 520; *see also Kallman v. Radioshack, Corp.*, 315 F.3d 731, 742 (7th Cir. 2002) ("Kallman incurred the expense for her counsel's services and paid their bill . . . this is all that is required under an indemnity clause such as the one at issue here.") Moreover, even under Seventh Circuit case law discussing the reasonableness of a fee in a *statutory* fee-shifting case, reasonable attorney's rates are premised from the attorneys' market rates, *not* the local rates. *Mathur v. Bd. of Trs. of S. Ill. Univ.*, 317 F.3d

738, 744 (7th Cir. 2003) ("By simply declaring that the lower rate was appropriate because of the prevailing local rates in southern Illinois, without regard to the quality of services rendered by the appellants, the district court abused its discretion.") Finally, the court finds Emigrant's argument rather disingenuous given that the defendant failed to disclose what rates its New York counsel charged in the litigation, especially when it appears likely that comparable rates were charged by both parties' attorneys.

More broadly, Emigrant objects to the litigation costs the plaintiff requests for reimbursement given that Metavante switched its representation in the litigation from Kravit to Kirkland, resulting, in what Emigrant argues, duplicative costs and unnecessary travel expenses. Again, the court reiterates that the standard by which the court judges Metavante's fee petition is commercial reasonableness; individual scrutiny of each cost that a prevailing party requests reimbursement for is foreclosed by *Medcom* and its progeny. *Oldenburg Group Inc.*, 597 F. Supp 2d at 847. Moreover, regardless, the court notes that the stakes in this litigation were enormous and, given the defendant's choice to employ a high power New York law firm to try the case, the court does not find it unreasonable that Metavante hired a major Chicago law firm for trial. While there may have been some duplication of efforts in the switch between Kravit and Kirkland, the fact that Metavante fully paid the attorneys' fees and litigation costs, including the costs of the experts employed by each firm, without complete

confidence in reimbursement, indicates that Metavante has met its burden of proving commercial reasonableness. The court will not second guess Metavante's strategic choice to employ a second law firm for trial, given what was at stake in the case. *Id.* ("Here, OGI was exposed to over $10 million in liability, and thus hiring two firms to defend such a large claim was not patently unreasonable.")

Finally, Emigrant contends that several expenses incurred by Metavante's experts, were either duplicative or not sufficiently detailed. However, the court has already disposed of this argument, as Metavante has met its burden of proving the costs it paid were commercially reasonable.

In closing, the court notes that much of the briefing by both parties on the attorneys' fees and litigation cost issue was devoted to arguments over which party was at fault for the tremendous costs incurred by both sides in the litigation. The court, however, will not step into the thicket of trying to resolve the "blame game." Such an effort is not only futile, but is wholly irrelevant to the central issue of this order. The court merely concludes that Metavante, as the prevailing party in this litigation, has demonstrated that all of the attorneys' fees and costs it submitted were commercially reasonable as defined by the relevant case law. As such, Metavante is entitled to recover the full amount it submitted in its fee petition.

Accordingly,

IT IS ORDERED that the plaintiff's motion for attorney fees, costs, and disbursements (Docket #559) be and the same is hereby **GRANTED**; the defendant shall pay the plaintiff's attorneys' fees and costs in the amount of $ 9,998,969.95.

The clerk of court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 27th day of November, 2009.

BY THE COURT:

/s/_____
J.P. Stadtmueller
U.S. District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED JULY 14, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CASE NO.: 05-CV-1221

METAVANTE CORPORATION,

Plaintiff,

-vs-

EMIGRANT SAVINGS BANK,

Defendant.

ORDER

On June 15, 2009, after more than three years of litigation and a nine day bench trial, the court issued its order of final judgment in this case. (Docket #550). In doing so, the court entered judgment in favor of Metavante Corporation ("Metavante") and against Emigrant Savings Bank ("Emigrant") on the two counts contained in Metavante's second amended complaint, as well as the eight counts contained in Emigrant's second amended answer and counterclaims. On June 29, 2009, Emigrant filed a motion to alter judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure or, in the alternative, to grant a new trial pursuant to Rule 59(a).

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Under Rule 52(b), a party may move to amend the court's findings of fact and law within 10 days after the entry of judgment, and may simultaneously move for a new trial under Rule 59. Rule 59(e) similarly gives a party 10 days from the entry of judgment to file a motion to alter or amend the judgment. Fed. R. Civ. P. 59(e). Rules 52(b) and 59(e) are not meant to be vehicles with which to relitigate the issues in a case or advance new legal theories. *See Diebitz v. Arreola*, 834 F.Supp. 298, 302-03 (E.D. Wis. 1993). Rather, these rules require the moving party to establish that the court made a manifest error of law or fact, or show a change in the law or newly discovered evidence affecting the findings or judgment. *Id.*

Here, Emigrant contends that the final judgment should be amended to reflect that Emigrant prevailed on one of Metavante's claims for damages. Specifically, Emigrant asserts that the court found in Emigrant's favor and against Metavante on Metavante's claim that it was entitled to the full termination fee amount under the parties' Technology Outsourcing Agreement ("Agreement"). Emigrant refers to this as the "In-House Claim." Emigrant notes that this finding has immediate significance with respect to Metavante's expected request for attorneys' fees and costs.

Metavante responds arguing that neither it nor Emigrant ever asserted an independent "In-House Claim" and, therefore, Emigrant cannot be considered a prevailing party under the Agreement. Metavante notes that its second amended complaint asserted only

a breach of contract claim and a declaratory judgment claim.

Because Emigrant has shown no manifest error of law or fact, new evidence or any change in the law affecting either the court's findings or final judgment, the court is obliged to deny the portion of its motion made pursuant to Rules 52(b) and 59(e). The court's June 3, 2009 oral decision adequately set forth sufficient findings of fact and conclusions of law to support the final judgment entered in this case. The court was never called upon to enter a final judgment on an "In-House Claim." An "In-House Claim" was never pleaded or otherwise presented to the court as an independent damages claim. The "claim" to which Emigrant refers was merely a partial defense Emigrant put forth on the question of the appropriate termination fee owed to Metavante. Metavante prevailed on count two of its second amended complaint, which sought a declaration that Metavante was entitled to a termination fee. While the court found that Metavante was entitled to an amount less than the full termination fee under the Agreement, the record is sufficiently clear on this point. On the matter of attorneys' fees and costs, the court also made specific findings with respect to the relevant provisions of the Agreement. These findings are also reflected in the final judgment. Therefore, no alteration to the court's findings or the final judgment is necessary.

Emigrant also asks the court to either amend its findings to completely reverse the outcome in this case, or, in the alternative, grant a new trial pursuant to Rule

59(a). Emigrant argues the court committed manifest errors of law by finding in favor of Metavante on all claims. Emigrant contends that the court's findings of fact and conclusions of law were against the overwhelming weight of the evidence, that the court uncritically adopted verbatim most of Metavante's proposed findings of fact and conclusions of law and that the court relied on inadmissible testimony and extrinsic evidence. Although the court finds Emigrant's alleged points of error rather disingenuous in light of the court's lengthy oral decision, the court recognizes that Emigrant is free to take an appeal to the United States Court of Appeals for the Seventh Circuit if it so chooses. However, on the basis of the record before this court, Emigrant has failed to demonstrate that the court made any manifest errors of law or fact warranting amended findings, or an amended judgment, much less a new trial.

Accordingly,

IT IS ORDERED that Emigrant's motion for amended findings and judgment or for a new trial (Docket #553) be and the same is hereby **DENIED**;

Dated at Milwaukee, Wisconsin, this 14th day of July, 2009.

BY THE COURT:

/s/_____
J.P. Stadtmueller
U.S. District Judge

APPENDIX D — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED JUNE 3, 2009 AND EXCERPTS OF METAVANTE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ADOPTED BY THE DISTRICT COURT IN ITS DECISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CASE NO.: 05-CV-1221

METAVANTE CORPORATION,

Plaintiff,

-vs-

EMIGRANT SAVINGS BANK,

Defendant.

DECISION in the above-entitled matter, held before the Honorable J.P. Stadtmueller, on the 3rd day of June, 2009, commencing at 1:30 p.m. and concluding at 3:04 p.m.

TRANSCRIPT OF PROCEEDINGS

THE CLERK: The Court calls Metavante Corporation versus Emigrant Savings Bank, case number 05-CV-1221 for continuation of a bench trial. May I have the appearances beginning with the plaintiff.

MR. BLOOMER: Good morning, Your Honor, Andrew Bloomer on behalf of Plaintiff Metavante

Corporation; and with me today at counsel table are my partners, Ms. Jane Park and Mr. Paul Garcia and Metavante's corporate representative Mr. Brian Hurdis.

MR. BEGLEITER: For the Defendant, Robert L. Begleiter. With me is Gary Malone, Owen Glist and Alee Scott.

THE COURT: Good afternoon, Counsel, and good afternoon to you, Mr. Hurdis. Our purpose today is to provide counsel and their clients with the benefit of the Court's decision on the merits of the case. Before doing so, there is one little matter that the Court needs to address and that's the matter of the motion filed by Emigrant to strike the testimony of David Moffat, and I did not address that at the time of the arguments back on May 21st; and having reviewed both the direct and cross-examination of Mr. Moffat, together with the content of the motion, the Court is constrained to deny it.

I find nothing in Mr. Moffat's opinions to run afoul of either Rule 702 or notice requirements to opposing counsel. In point of fact, perhaps this is as good a time as any to relate to you, like any case the matter of expert testimony is truly a matter that is left for the fact-finder in the final analysis to weigh along with the lay testimony.

And in this particular case, while to be sure the expert testimony was indeed instructive on a whole host

of subjects, in the final analysis it fortunately or unfortunately, I guess depending on one's perspective, does not control the day. As we will learn momentarily, this is in the final analysis a breach of contract case; and it is driven by documentation together with the results of the performance under the contract, and I will get into the breadth and depth of the Court's decision momentarily.

As His Honor earlier noted, this case brings with it a long history, having originally been filed in the Milwaukee County Circuit Court back in September of 2005. It truly started out as a collection-related case to recover fees allegedly due Metavante under the parties' previously agreed-upon technology outsourcing agreement under the terms in which Metavante was to provide processing services associated with Emigrant's retail online banking endeavors.

Over the past three-and-a-half years this case has generated more than 500 docket entries requiring the commitment of significant judicial resources to bring the case to fruition. The Court's decision today represents the culmination of a trial to the Court which commenced on May 4th and spanned some nine trial days which also included an 18-page compilation of undisputed facts found at docket number 522.

In addition, the Court heard the testimony of 21 live witnesses, eight of whom were called on behalf of Metavante, 13 of whom were called on behalf of Emigrant. That testimony consumed more than 2,250 pages of transcript testimony.

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In addition, the Court was called upon to review the testimony of seven additional witnesses, which was presented either by way of deposition and/or video excerpts.

In addition, more than 300 exhibits, many of which were 70 to 120 pages in length, were received in evidence. The Court devoted an entire day, May 21st, which in itself consumed more than 200 pages of transcript of counsel's arguments.

At the Court's request in addition to the original proposed findings of fact and conclusions of law, each party provided the Court thankfully with an updated annotated set of proposed findings of fact and conclusions of law which I would be the first to acknowledge have proved to be of most valuable assistance to the Court in its independent fact-finding process.

As I noted, in the final analysis this is a breach of contract case; and by way of summary so no one is left wondering what the ultimate findings of the Court are going to be, I'm going to give you a short overview followed by the Court drawing from the findings of fact and conclusions of law that support the Court's analysis.

Initially, the Court finds that there was no material breach of the technology outsourcing agreement by the Plaintiff Metavante. As a consequence of that finding, the Court further finds that Emigrant had no factual or legal basis to terminate for cause the technology

outsourcing agreement so as to either avoid payment for monthly service fees or a contract termination fee.

If for some reason Emigrant truly believed that it did have reason to terminate for cause, the May 8th, 2006 notice of termination for cause failed to measure up to the Wisconsin contract law requirements since there was no demand either in the May 2006 notice of termination or other request part and parcel of that communication to call upon Metavante to comply with the terms of the underlying technology outsourcing agreement.

In addition, the Court further finds that there was no fraud in the inducement or other misrepresentation on the part of Metavante either during the contract negotiation process or after the underlying technology outsourcing agreement was executed that would serve to constitute a valid claim or cause of action otherwise entitling Emigrant to recover monetary damages for economic loss.

On the matter of the termination fee, the Court finds that Emigrant migrated its data processing for direct banking to an in-house solution during the initial 36 months of the term of the underlying technology outsourcing agreement and is, therefore, obliged to pay a termination fee to Metavante in an amount equal to 50 percent of the estimated remaining value calculated using a 36-month term.

And based upon these findings, the Court determines that Metavante is entitled to recover the following sums: $1,773,641.13 in unpaid processing fee as well as a declaratory judgment reflecting that all prior payments made by Emigrant under protest were appropriately billed under the terms of the contract, and they rightfully belong to Metavante.

These prior payments include $2,205,316.24 remitted on or about November 29th, 2005; $266,070.01 remitted on or about December 7th, 2005; $44,640 remitted on or about December 12th, 2005; $45,496.42 remitted on or about February 16th, 2006; $3,655,000 remitted on or about April 26th, 2006; and finally the termination fee billed on or about July 14th, 2006 in the amount of $3,783,699.50.

The balance of the Court's comments this afternoon will provide counsel and your clients with an analysis of how the Court arrived at the ultimate determinations that I've laid out.

To be sure, the underlying contract was not a perfect document just like life itself is not perfect. There are many reasons that one could advance as to explain why the document may not have been as perfect as it might otherwise be. Truly it was the product of an iterative process by which principally the marketing folks at Emigrant were most directly involved, particularly after Mr. Healy signed off on Metavante being a good candidate to provide the services that Mr. Morehouse and Ms. Lyon were looking for.

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Keep in mind that Mr. Morehouse was involved in the thought process to develop an online banking product for his employer, Emigrant, dating back to 2002 as reflected in his direct as well as cross-examination testimony, in particular pages 148 to 152 and page 203. That testimony compared and contrasted with the testimony of Mr. John McNally and William Scialabba points in considerable contrast the thought that Emigrant wanted this direct online banking product in the marketplace as soon as possible.

Yes, there were other considerations including the provider of online banking services technology to ING from a firm known as Sanchez, and Emigrant received a proposal from Sanchez; but in the words of Mr. Morehouse, it was too expensive, it included components that were outsourced by Sanchez; and finally Sanchez was recently sold to Fidelity leaving some question in Mr. Morehouse's mind as to whether or not the ability of Sanchez might somehow be compromised or effected as a consequence of the sale of their technology business, but it doesn't end there.

In terms of the underlying agreement there were many opportunities along the way for Emigrant to have built, as one might say, a better product; but time constraints and the interest of getting into the market are continually a consideration that is in the forefront of any business entity bringing a particular product or service to the market; and if one were to consider, for example, the testimony that the Court received from Mr. Roger Nebel, who I would best describe as

providing what might be best considered as, quote, selective analysis; and to translate that into layman's terms, that would mean being very critical of athletes such as Babe Ruth who although held the home run record for many years at 714, yet struck out 1,330 times. And the fact Babe Ruth struck out 1,330 times by no means and in no manner denigrates or takes away from the wonderful career that he brought to professional baseball. The same could be said for Hank Aaron who played here in Milwaukee for many years. He had a home run record that stood until Barry Bonds eclipsed him at 765, yet Hank Aaron struck out 1,383 times.

And in layman's terms, I find that's the best analysis to use when the Court is called upon to consider the testimony of someone like Roger Nebel because in the final analysis Mr. Nebel did not take into account the overwhelming success of Emigrant's online banking product; over 250,000 depositors, almost $7 billion in deposits in the 18-month plus time frame that Metavante provided these services.

In addition, Mr. Nebel's analysis is further flawed by virtue of not having made comparisons of Metavante and Emigrant's joint success with the online banking product with others in the marketplace; and I would suggest that that is a very, very difficult task because as we all learned during the trial there are so many factors beyond the accessibility and availability and the nuances of website design that drive many individual customers who migrate toward this sort of product whether it be interest rate, whether it be how big the

bank is as an institution compared to Citi or ING or many others who are competing for these same saving dollars.

And so as a consequence the Court was left in all honesty to evaluate most of what has been presented to the Court in the context of what the lay witnesses had to say about this. And the lay witness's testimony, I believe, overwhelmingly comports with the fact as best enunciated by Mr. Scialabba that we endeavor to work together continuously to address issues; and then you layer on top of that the testimony of John McNally who, for example, who although he signed and was the signatory to the last amendment to the technology outsourcing agreement, he did not realize until it was raised in this very courtroom that the contract included provisions for subcontractors.

And this in the Court's mind raises a considerable anomaly in comparing Mr. Morehouse's candid testimony about why he was not interested on behalf of Emigrant in pursuing a technology outsourcing agreement with Sanchez; why some of those very concerns were not raised with Barry Holst during the March 4th, 2004 meeting, that is, who are you actually using to implement the product that you are proposing for Emigrant. And if it didn't come there, it certainly should have raised a significant question if only who when the very first contract was submitted to Emigrant for its review.

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Now, in a perfect world in the few contracts that I have had the experience of dealing with, in most very significant contracts not only is there a provision that details the fact of the use of subcontractors, they have to be detailed; and there was no detail either asked for or provided.

Would it have been better had Metavante disclosed in that iteration whether it be a draft or the final version who the actual subcontractors may be, perhaps; but that doesn't vitiate or in any sense suggest that there was fraud or misrepresentation involved in the negotiation process.

It would have been better. It perhaps would have caused Mr. Morehouse and his colleagues to raise questions; but in the final analysis this is a very much two-way street; and as a consequence of the contract language such as it is, and such as that language was reviewed by individuals within Emigrant, they had as much an obligation to inquire as to whether de facto there would or were going to be used any subcontractors in fulfilling Metavante's contract obligations.

The other considerations that underlie the Court's determinations with regard to its ultimate findings derive from a series of, you might call them, side issues or concerns that found their way into the litigation process; the first of which relates to the good funds issue; and as we know from the evidence that came forth during the trial, it is clear that Emigrant had multiple opportunities before going alive with the public on the

launch of the direct bank endeavor to have called upon Metavante to build into the system software before launch that which was ultimately accomplished in June of 2005. That is an appropriate control such that Emigrant would not find itself on the short end of the stick with overdraft situations.

There is this issue that also was raised with regard to whether or not savings accounts could be overdrawn. Again, a little bit of a side issue, and while certainly not playing any role in the Court's decision today, but I raise it because it does bring to counsel's attention the fact that like a single judge jurors are called upon to decide cases in the light of their own common experiences in the affairs of life.

And in this particular case back on or about May 14th the court staff had such an experience. Mr. Finn had occasion to purchase an automobile and to have a certified cashiers check drawn against a particular account. And fortunately or unfortunately, I guess depending on your perspective, the bank charged the check to Mr. Finn's savings account rather than a checking account resulting in a very significant overdraft which triggered an overdraft fee; but nonetheless the check is paid.

And so there is one little example of how different institutions deal with those sorts of conundrums. There have also recently been advertisements in order to secure bank customers that basically say so in so many words that the customer can overdraw the savings

account and provided he or she has the same protections that are afforded under a traditional checking account.

So I think in the final analysis Emigrant was perhaps not as aware as they might have otherwise been, but I suggest that they were not as attuned to some of the nuances associated with technology because they did not take advantage of the Bill Scialabbas and the John McNallys as part of the negotiation process; and more significantly, when Mr. Morehouse sent a memoranda to Mr. Milstein on July 15th, it's unclear from the record whether that memo actually went out before Mr. Morehouse and Ms. Lyon saw a Core-Teck proposal. There's a time stamp or a fax date time of 1:30 in the afternoon as to when it was sent. If the Core-Teck proposal arrived before Mr. Morehouse sent his memo to Mr. Milstein saying everything is just fine and we're ready to conclude, there are no obstacles in store, et cetera; yet whether he had the benefit of the Core-Teck proposal or critique before the memo was sent or not, that's somewhat beside the point because he certainly had every reason to address the concerns that Core-Teck had, perhaps not with Mr. Milstein at that point; but he certainly had an obligation to address them with the technology team at Emigrant; and more significantly, I would suggest, he had an obligation to have a frank and candid conversation with the folks at Metavante not raising the issue in terms of what Core-Teck had to say, but sort of asking the question to which you already have an answer, that is, there may be a bit of troubled water out here; what do you have to say

about this before we finally sign off on a contract. None of that was done.

And so when it comes to suggesting that anyone was misled or deceived, in the Court's view Emigrant through its own employees, agents, outside parties has only itself to look to in terms of these asserted deficiencies that have been catapulted, if you will, into a suggestion that there was fraud or that they were misled or that along the term of the contract Metavante breached that which it had agreed to provide as enumerated in that 35-page contract.

And so when we look at it through the prism or looking glass of those core facts, it's of some significance to His Honor that these matters were not appropriately vetted. A similar argument and connotation and inference can be drawn from the fact that in at least two of the iterations of the contract there was a footnote on page 18 that for purposes of determining what reasonable fees ought to be from Metavante's perspective as well as Emigrant's, there was reference to a 25 percent abandonment rate.

Now, Mr. Morehouse – and again I have no reason to suggest that he was anything but credible as Mr. McNally and as Mr. Scialabba were in his response basically accepting that figure but really not being intimately familiar with how it was arrived at or for what purpose. I appreciate it was an assumption for purposes of trying to come up with an agreed technology outsourcing agreement that both parties could live with,

that is, reasonable in terms of cost and reasonable in terms of Metavante meeting a stream of income to support the services that were being called upon to be provided through the term of the agreement.

It is also important to keep in mind this matter of termination, and I'll have more to say about that a little bit later; and that relates to the fact that it was readily apparent from the get-go, if you will, that Emigrant had the presence of mind to want to draw upon its own resources in converting to an in-house system of providing the same service.

And so there are provisions in the contract that deal with the subject of transitioning to an in-house system just as there are provisions in the agreement, and I'll have more to say about this a little later as well that deal with the matter of confidentiality of Metavante's product, that is, their software and its integration with the customer, in this case, Emigrant's client base of data.

One of the things that the Court found to be – perhaps troubling is too strong a word – but we've heard an awful lot about integration throughout the course of this litigation; and it's certainly an apt word here because there is no true integration of the confidentiality provisions found in the technology outsourcing agreement with the matter of termination assistance, with the matter of converting to an in-house solution using the software platform created by the client, in this case Emigrant.

The document is frankly silent, and it takes a bit of a leap of faith to jump from these confidentiality provisions to the termination assistance to the matter of the creation of an in-house solution created with software by the client, again in this case Emigrant.

So against that prelude I now want to turn to the proposed findings of fact and conclusions of law; and for purposes of my decision this afternoon I'm going to be drawing quite extensively from the proposed findings that were submitted by Metavante. That is not to mean or suggest or convey to anyone that this Court did not give due consideration and review in great detail the proposed findings that were submitted by Emigrant; but given the Court's announced ultimate findings I believe in the final analysis those findings, although as we will see as we review them, do not coincide lock step with the Court's ultimate decision. They do provide a better starting point given the Court's assessment of the evidence.

And I'm not going to review each and every line of Metavante's submission, but I am going to in summary fashion and in greater detail when required address the proposed findings; and so at the outset the Court adopts each of the proposed findings of fact as they appear on pages 3 through 17 of the proposed findings of fact. When we get to the bottom of page 17 – and by the way, each of these are numbered paragraphs; so the record is clear, paragraphs 1 through 66 as numbered inclusive.

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When we get to the matters of the terms that have been used in the agreement, I think I commented during the trial that 42 of the terms that are used in the agreement are given particular definitions in the contract terminology. There are a couple of terms that have been used that we do not find those definitions; and, of course, they include in-house about which Mr. Nebel testified as did Mr. Moffat.

There's also the question of what is or is not commercially reasonable. And Mr. Nebel in his testimony made perhaps this subtle difference but nonetheless a difference, and quite frequently rather than using the term commercially reasonable, used the term commercially substandard. Given the fact that neither in-house nor commercially reasonable are otherwise defined in the technology outsourcing agreement, the Court is left to apply the ordinary meaning given to those terms whether in a dictionary context or in a real world context.

In the context of commercially reasonable as noted in paragraph 66 of the proposed findings of fact on page 17, the Court finds the better guidance, if you will, as to a definition for that term to be set forth in Black's Law Dictionary; and although it appears in a property sale context, there is no reason that it ought not have equal application in the context of the sale of technology outsourcing services.

And as such, Black defines commercially reasonable as a transaction conducted in good faith and in

accordance with commonly accepted commercial practice. Now, it may well be that if Roger Nebel was called upon to critique the Guidant system for the next space shuttle or Boeing's new triple eight aircraft, much of what he had to say in this courtroom over the better part of a day may have some relevance, but we are not dealing with, as one might say, rocket science in terms of the commercial world.

What we are dealing with is the reality that much of what we see in society has transitioned to an electronic format using that wonderful medium known as the Internet, and the Internet as we know it has been around for barely 15 years. And with each passing day the activities and the services that are available to the consuming public through the Internet are becoming just as sophisticated as the computers that we are able to access these services on.

And to be sure, along life's path there will be a hiccup or two; and to be sure, there were hiccups in the Metavante/Emigrant relationship; but I suggest and I find on the basis of all of the relevant testimony including the documents that have been submitted, that while there have been hiccups none of them rose to the level of amounting to what might be viewed as a breach of the contractual obligations that Metavante provided as the relationship began, developed, matured; and, again, I cite the very candid testimony throughout both of their testimonies of Mr. Scialabba and Mr. McNally. And we layer on top of their testimony what Mr. Milstein was telling his board of directors during this enterprise with Metavante.

Oh, to be sure there was in the background this whole notion of converting to an in-house system; but when one looks at the successes and how Emigrant was conveying the successes not only in their advertisements but within the banking community and with Internet providers, and having received all of the accolades and recognitions that come with the development and the initialization of a product such as Metavante made available, it is, frankly, nothing short of a home run.

Mr. Hickey described it as being at least a triple; but I suggest from a neutral observation of not only the testimony but of the many exhibits that underscore the tremendous success that Emigrant enjoyed as a result of the partnership with Metavante, there isn't any other way to describe it as being a total commercial success unmitigated, unfettered.

And so going forward from proposed finding number 67 through proposed findings at page 25 through 105, the Court adopts each of the proposed findings of fact submitted by Metavante together with the Court's comments that I made in the last few minutes.

The next subject that we come to is the matter of termination, and the proposed findings that are before the Court start this analysis with proposed finding 106 on page 25; but there's a little more to all of this than meets the eye, as one would say, because I mentioned earlier the matter of this litigation having been initiated back in September of 2005, and I mentioned that this case got its start as a collection case; and during the

period that the collection case had actually been filed but not yet served, there were some activities behind the scenes beginning with some communications, both written and oral, between Howard Milstein and Dennis Kuester; and there were discussions along the lines of perhaps it's time for both parties to move on, to cut our ties, terminate the agreement, and Emigrant convert to an in-house system of processing.

And these discussions as delineated in exhibits such as 1336 and 1337 and the second amended complaint, there's a couple of exhibits attached to Exhibit 1338 and Exhibit 184, there may or may not be one or two more; but the point of all this is is that if there were any telltale signs about what was really afoot – and by the way Mr. Scialabba and to a lesser extent Mr. McNally confirmed much of this in their own testimony because they were beginning to work on an alternative dating back as far as April of 2005; but in any event, after this litigation was filed, there were these ongoing communiques between Metavante and Emigrant both about reducing the fees, deconverting and so forth.

And then it became apparent because the complaint was served on or about November 10th that perhaps in Emigrant's eyes Metavante was a little more serious about the matters of breach for nonpayment of the fees than perhaps Emigrant had otherwise begun to appreciate.

And as a consequence of that, that frankly from a review of the correspondence of November 16th, and

November 29th, and December 2nd, December 7th more than amply suggests that the parties were headed toward a relationship that would result in the agreement being terminated not for cause but for the convenience of the parties; and there became a bit of focus on the matter of termination assistance as detailed in Section 2.2 of the agreement.

And there were discussions along the lines of deconverting as of the end of March and then it got pushed back. Ultimately it occurred, as we know, in late July; but this was afoot long before this May letter to Metavante from Mr. Hickey attempting to terminate the agreement for cause.

A reasonable person reviewing the entirety of the testimony, the exhibits, the timeline might reasonably conclude or infer that what was really afoot with this May termination letter for cause was an attempt to avoid the otherwise applicable provision of the agreement requiring payment of a termination fee based upon the applicable provisions, and we'll get to that in a bit.

And as a consequence – Initially, there was a refusal to tender the termination fee; and as a consequence the – not knowing whether frankly they were afoot or horseback at that point, Emigrant filed a motion with this Court seeking an injunction precluding that – precluding it having to pay this termination fee in exchange for receiving the appropriate transfer of the customer data to transition into their own in-house solution.

And as we know the Court denied that motion finding that there had not been demonstrated irreparable harm such that the Court invoke that extraordinary remedy. And so ultimately the termination fee as it was calculated on the basis of the 36-month term and a transition to in-house created system that is created by Emigrant for use in-house, a termination fee of $3,783,699.50 was paid under protest.

The fees that were the subject of the original complaint were also paid under protest as were a number of other smaller amounts that became due during the successive months, which now brings us to those successive months and the fees that were generated as a result of processing that Metavante did during those months; and those matters are addressed in proposed findings 152 through 155 on page 34 of Metavante's proposed findings; and, again, based upon the evidence and the Court's analysis of that evidence, I adopt each of those findings.

This now brings us to the whole genre of the termination fee and the successor system; and at the outset, while most of what I have related to you this afternoon has been very much straightforward, because of the language that has been provided to the Court and used in the agreement, which is where it derives from, is somewhat cumbersome, a bit awkward in some instances, the Court has spent considerable time addressing the matter of what ought to be the appropriate termination fee.

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Metavante suggests that the termination fee be the entire amount with interest, some $20 million suggesting that the processing platform that Emigrant developed was not developed in-house citing both outside contractors, outside software; and then there's this whole matter of whether or not confidential information derived as a result of the relationship with Metavante found its way into Emigrant's in-house solution.

The Court is drawn to that provision of Section 1-B of the agreement which provides, and I quote, notwithstanding the foregoing, if after the initial 36 months of the term the customer migrates its data-processing for direct banking to an in-house solution creating their own data-processing platform, the customer may terminate this agreement without payment of any termination fee after giving Metavante at least six months prior notice.

My view of this language leads me to conclude that the phrase in-house is an adjective describing solution. It is not in the parlance of the language that I just quoted used as an adverb to describe data processing platform. It is perhaps an oversight, perhaps part of the give and take of the negotiations, I'm not sure what; but it is clear that the parties did not use the in-house as an adverb to describe the process of creating a data-processing platform.

They did use the in-house phrase as an adverb later in the second portion of Section 1-B suggesting that for better or worse both parties understood the difference

between a solution that ran in-house, that is an in-house solution, and a process by which that solution is made being conducted entirely in-house.

Accordingly, the Court finds that the process by which Emigrant created the successor system was not limited by the phrase in-house. In other words, I find that Emigrant was indeed obliged to create its own data-processing system but at the same time was not prohibited from using outside help during the creation of that in-house system.

Accordingly, the Court finds no violation of the terms of the agreement in Emigrant's use of Messrs. Weaver or Mello or the use of off-the-shelf software in creating its in-house system.

That brings the Court to perhaps the most nettlesome issue in this analysis, and that relates to the matter of the apparent, although certainly not proven convincingly in the eyes of the Court, the use of confidential information and whether if utilized such information meant that Emigrant did not create their own data-processing platform; and even if for purposes of discussion Emigrant violated the confidentiality provisions of the agreement and used part or some or reversed, that is, not adapting certain of Metavante's processes or screens that customers would see or the like, which invokes another question of exactly how much of this is truly confidential after all if it shows up on a website as a graph or graphic, how could one consistently say something is confidential; and, again,

harkening back to definitions in the agreement, there is really no refinement as to exactly what was, what was not confidential; and, if so, how so; and more significantly, as I commented earlier, how these matters are interrelated with the matter of creating ones own data-processing platform or receiving termination assistance or the like.

Quite candidly all of this could have been dealt with very succinctly and that is have no provision for scale of termination fees and just simply have a dollar amount irrespective of whether it's another vendor, or an in-house created, or a platform created and then used in-house or what have you. It is very, very cumbersome and very awkward to try to assess what is truly meant by the these competing, if you will, provisions.

And in the final analysis all the Court is left to do is to interpret these phrases and language in a manner that is hopefully consistent with what the parties intended because we do have a complete document, and it may be subject to a variant here or there; but, nonetheless, I believe from the Court's analysis as the Court remarked during the trial when it came to this matter of the 12 percent interest and whether it truly applied in a situation where the amount was disputed as opposed to the language used in the contract where it's undisputed.

And so in a matter of 24 hours we went from 12 percent to the statutory amount of 5 percent; and so it is like the situation presented with the interest rate

computation where the Court is left in less than a comfortable position with how these matters are to be interrelated and interpreted consistent with the parties' intentions.

Clearly on the surface, although not pled in the pleadings, there may well have been a breach of the agreement by Emigrant if for no other reason than utilizing the information; but I've already found that the language in the contract on the one hand does not prohibit the use of outside consultants, use of outside software as long as it in the final analysis is a product that Emigrant is responsible for as opposed to some third-party vendor who completes the entire process and operability of the software and then allows Emigrant to simply convert it to an in-house operation, if you will. That's appropriately addressed separately within the four corners of the agreement.

And so when it comes to the proposed findings beginning with 113 on page 27 and continuing through proposed findings on page 31 which winds up with proposed finding 134, there is much to be said about what Metavante has submitted in terms of proposed findings. The problem that the Court has with it is that there were no source codes brought to the Court's attention in terms of wholesale use of Metavante's processes, or processes, just as there were no stark examples whether in Mr. Scialabba's testimony or Mr. McNally's testimony or Professor Garland's testimony that delineated even in the context of reverse engineering what it is that Emigrant learned from the

use of the Metavante product to cause it to change or, as they say, reverse engineer, build a better product. There's just simply not sufficient detail. And I suggest that this is one of those, in the parlance of grammar, dangling participles out there that I don't think in the context of this litigation we will ever get a good solid answer to.

And while I've acknowledged that, and while Mr. Scialabba and Mr. McNally and others have acknowledged that, there is no setting aside the fact that the same people developed the platform at Emigrant that were involved with Metavante, and so you can draw an inference that at least they had the information available to them; but whether it was utilized and whether the information actually utilized falls within the parameters of what ought to be viewed as confidential, again, keeping in mind that Metavante's systems were not running in Emigrant's computer rooms, their processing was being done both back here in Wisconsin as well as Teknowledge and HCH and elsewhere. So from that standpoint one could draw, unless provided to Emigrant as part of the termination assistance process, they really didn't have much beyond what the public had available to it in terms of resources to draw upon.

And so to cut to the chase, I simply cannot find on the state of the record that although there may well have been a breach of the confidentiality provision, it has not been alleged as a basis to terminate the relationship nor has it been sufficiently developed in the context of

Metavante reminding Emigrant as part of the termination assistance process of Emigrant's obligation not to rely on these sorts of confidential materials.

When it comes to the matter of the use of outside consultants and third-party software, again, I draw upon the Court's earlier findings with regard to the operative language in the agreement; and I have concluded that based upon the Court's construction of that language that there is no prohibition on Emigrant's use of either outside consultants or third-party software or testing or the like.

With regard to the matter of the unpaid processing fees addressed in proposed findings 152 through 155, given the Court's earlier findings, I find that there is outstanding the sum of 1,773,641.13 that remains due and payable.

As for the matter of the termination fee, in light of the Court's earlier determination, I am not able to adopt the proposed findings 156 through 160 and instead substitute the Court's finding that the sum of $3,783,699.50 which represents the termination fee that was paid as noted by Mr. Daroga during his testimony, and that is addressed in proposed finding 159.

The Court will also adopt finding 161 that requires pursuant to the terms of the agreement that Emigrant pay the costs associated with collection of this amount including the court costs, reasonable attorney's fees and other fees and costs or charges incurred in collecting this amount.

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As the Court earlier noted with regard to these defenses and counterclaims that Emigrant has brought forward, for the reasons previously commented on I do not find given the level of performance, the incredible success of the Metavante product in the implementation of Emigrant's online banking services rises to the level of even meriting serious consideration as a fraud claim. And as the Court earlier noted, whether it's fraud or misrepresentation the Court finds the facts including the testimony of the lay witnesses simply do not support that theory; and I suggest that much of this is driven by the hard reality of one trying to avoid its contractual obligations that otherwise come into play and the Court has found applicable here.

That now brings us to the – Well, before addressing that I also should put a comment on the record that since the Court has found no basis either in fact or law to suggest that there was fraud or misrepresentation either during the negotiations or thereafter, the Court does not reach this whole issue of consequential damage as advanced by Mr. Pocalyko; and I make no findings with regard to damages as related to any of Emigrant's counterclaims because the liability is simply not there, and there is no reason for the Court to decide that which need not be decided.

That now brings us to the conclusions of law, and in this regard the Court will once again adopt the conclusions of law that are addressed in paragraphs 1 through 55. With regard to conclusion of law 55, Mr. Bloomer and Mr. Garcia, I would invite you to

recalculate as part of the ultimate judgment to include a judgment factor from the date the amount was owed through today's date so that we have an accurate amount; and so I'm not going to adopt the 2,019,219.40 figure today.

And as a consequence of the Court's earlier fact-finding process, the termination fee has been determined to be $3,783,699.50 which has already been made; and I will comment briefly in a moment with regard to the declaratory relief that's addressed in paragraph 71 on page 49 and the proposed conclusions of law.

Beginning with paragraph 62 on page 48 – well, there's no need to address the first sentence in paragraph 61 because there was no showing of insolvency or disaster, and the Court does consistent with my earlier findings adopt the balance of that paragraph, namely, that Emigrant did not terminate the agreement for cause in compliance with Section 8.2 of the agreement.

When it comes to paragraphs 62 and 63, I adopt the paragraphs but removing the word not. As to paragraph 64 there's no need to address that because the Court has already found that using outside sources consistent with my interpretation of the language of the agreement does not require a finding that it did or didn't acquire the software from another source. They did acquire off-the-shelf software, but it was not wholly used, that is, independently used as a substitute for Metavante's services.

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On the matter of the use of confidential information, given my comments earlier I make no conclusion of law and find nothing with regard to that. Similarly, 66, 67, 68, 69 I, given my earlier findings, find no reason to adopt any of those conclusions of law.

That brings us to paragraphs 70 and 71. I've already made a record on the matter of fees, court costs and attorney's fees. Seventy-one addresses the declaratory judgment requested; and as I found at the outset of this afternoon's proceeding, Emigrant made those payments as they are addressed in paragraph 71, and I find and adopt my earlier finding that Metavante is entitled to retain each of those payments, again, on the basis of the terms of the technology outsourcing agreement.

Likewise, given the Court's earlier findings, I'm constrained to adopt the proposed conclusions of law addressed in paragraphs 73 through 82 of the proposed conclusions of law. Likewise, on the fraud and the inducement and misrepresentation claims, the Court is similarly constrained to adopt the proposed findings addressed in paragraphs 84 through 107.

As to the balance of the proposed conclusions of law, based upon the Court's earlier rulings, the Court is not obliged and finds no reason to address them since in large measure they relate to matters that would follow had the Court found liability with respect to the claims and counterclaims advanced by Emigrant.

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It's been a long afternoon, and I indicated that it would take about an hour-and-a-half to two hours, and we're just under an hour-and-a-half. I do want to make in conclusion a couple of comments that should be part of the record.

First of all, in my now 22 years and two days as a judge I do have to say I continue to be impressed with the lawyering that was presented on behalf of each of your clients in this case. To be sure it was hard fought from day one and for good reason because at the end of the process as I may have commented when I suggested the first time we met here in this courtroom, that ultimately we are talking about that age-old commodity, namely money.

Every case has value. Every case has nettlesome issues, and this case was no exception; but in the parlance of judging, I do have to tell both sides that it was a hard fought case; but from the Court's perspective it was in the final words a good case for everyone to get his, her and its arms around, and you did particularly a good job in streamlining the proof at trial; and even though in the ultimate decision of the Court some of it wound up not being quite as relevant as it might be, but as we all know there is another level, and that is the Court of Appeals.

And we've all made our respective records, and the Court of Appeals may have a different view on whether there's a breach, whether there is an entitlement to the full termination fee, that is the $20 million plus, but all

each of us can do is represent the interests of I, as the thoughtful jurist unfettered by who the client is or who the lawyers are, and you, as advocates that represent your clients as ardently as you have throughout this litigation.

Mr. Bloomer, do you have anything else you would like to add to the record today?

MR. BLOOMER: I did have a couple of items, Your Honor, if I may that I noted in my notes.

THE COURT: Sure.

MR. BLOOMER: The first is, and it may be that just in taking them down I was mistaken; and if so, I apologize, on conclusion of law 83 I had down that you had adopted 73 to 82 and then 84 to 107.

THE COURT: All right. Let's go back.

MR. BLOOMER: And I wanted to just inquire, if I may, about the status of conclusion of law – Metavante's proposed conclusion of law 83 on page 51, Your Honor.

THE COURT: I now know what it's like when lawyers are looking for exhibits on counsel table because I've got every page except 51. Oh, 83 is the good faith?

MR. BLOOMER: That's correct, Your Honor.

THE COURT: Yes.

MR. BLOOMER: The implied duty.

THE COURT: Yeah, if the Court overlooked that, it was an oversight on His Honor's part; so I did adopt it.

MR. BLOOMER: Okay. Thank you, Your Honor. And then the other – In the discussion of the termination you had made reference, I believe, that started at proposed findings of fact 106; and then Your Honor went on to say that you would not adopt 113 through 134 which dealt with the confidentiality and successor system issues; and the only question I had, Your Honor, was paragraphs of the proposed findings 106 through 112. I didn't have in my notes that the Court had made – whether it had adopted those or not. You did mention 106. You said that's where it starts.

THE COURT: Yes, clearly 106 through 112 are adopted.

MR. BLOOMER: Thank you, Your Honor. And then on the issue – Your Honor referenced fees and costs; and if – what I'd like to request given that there was a predecessor law firm in the case is that we might have 45 days to submit that to the Court. Having gone through fee petitions and whatnot, it's fairly detailed work; and we'll need to work with our client and our predecessor firm. If Your Honor would see fit to grant us 45 days to do that, that would certainly I think help us out and help us to present in a nice neat package to the Court what we have to submit on that.

THE COURT: All right. That request will be granted. And I would also ask you as the prevailing party to prepare an appropriate judgment, circulate it to Mr. Begleiter and Mr. Malone and his colleagues and get it to the Court.

MR. BLOOMER: We will do so, Your Honor, with dispatch; and then finally just to once again on behalf of Metavante, my client, and my partners and I'm sure on behalf of Mr. Begleiter and his team to thank Your Honor for the time and attention over the years to this – to this case and your thoughtfulness. It's certainly much appreciated.

If all judges on the bench had the patience of a saint that this Court has in dealing with it in the sense of fairness, our civil justice system would be – would be even better than it is, but it's very much appreciated; and I just wanted to say that once again, Your Honor.

THE COURT: Sure. If I were a senior judge not taking criminal cases I would take the time and give you a written decision; but you would not get a written decision in this case probably until October or November, and that's unfair. It's most unfair to your respective clients and it's unfair to the process; so I learned a long time ago that there's no time like the present to decide. And both sides were very helpful in bringing matters to the Court's attention before the first witness took the stand and annotated things with the benefit of transcripts and exhibits; so I want to echo the thanks of the Court, again, for your stick-to-itiveness

in presenting the case in a very, very thorough manner; and that's true on both sides.

MR. BLOOMER: Thank you, Your Honor. I'm reminded by my partner that there are – there are a number, and we can put this in a judgment, but there were a number of – besides the motion to strike Mr. Moffat's testimony, there were a number of, I believe, pretrial motions in limine as well as, I think, motions for judgment as a matter of law filed by both parties. I take it the Court's view of all of those would be –

THE COURT: Well, as far as the motions in limine, the only one that really, really had to deal with was Mr. Moffat. There were a couple of other things as far as the clerk's office goes. Once the trial has been concluded and the minutes, these motions in limine will all be terminated; so there won't be any further order because they were not addressed. In some cases witnesses didn't testify or exhibits weren't used; and so if you want to make appropriate reference to those subjects, you're certainly free – feel free to do so. It will make the record cleaner and easier for the clerk's office to deal with.

MR. BLOOMER: Okay. In connection with the preparation of the judgment?

THE COURT: Yes.

MR. BLOOMER: All right. That's all I have. Thank you, Your Honor.

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THE COURT: All right. Mr. Begleiter.

MR. BEGLEITER: Yes, Your Honor. A small point. We will take the position that a determination on attorney's fees should apply to an appeal if there's going to be an appeal. That will be our position. I thought it was important to put that on the table right now. I'm not asking –

THE COURT: Well, there is some Seventh Circuit case law on the subject, and I don't have it at hand; but I have been involved in a couple of cases where we have gone ahead and determined the attorney's fees; and maybe nobody raised it as an issue on the appeal, but it certainly ought not hold up the appeal process, if that's what you're concerned about.

MR. BEGLEITER: No, my concern is very simply, it just seems to me that once the process is concluded that's the appropriate time to determine the extent of the attorney's fees. We just had in the Ninth Circuit –

THE COURT: Sure.

MR. BEGLEITER: – and that's what the judge – I'm just letting the Court know –

THE COURT: And quite candidly, now that you have a decision, it may not be the one that either side likes; and if you had the benefit of what Mr. Bloomer and the Kravit law firm were expecting in attorney's fees, maybe

all of this will provide a basis to bring this to a reasoned conclusion, too; so there are many ways of looking at it.

MR. BEGLEITER: And on that score there is another provision in the agreement that gives the prevailing party an opportunity to seek attorney's fees. From our view we prevailed on a major issue. That's – Again, I'm not asking for a ruling on this. I just think that should be brought out right now.

THE COURT: Sure.

MR. BEGLEITER: Again, I want to thank Your Honor for his time and his efforts and his – and the way you conducted this trial.

THE COURT: All right. Thank you all. Have a wonderful rest of the afternoon, and we'll watch the case now from afar. The Court stands in recess.

METAVANTE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AS ADOPTED BY THE DISTRICT COURT IN ITS DECISION*

ADOPTED PROPOSED FINDINGS OF FACT

1. Metavante has provided financial processing services for over 40 years. Metavante currently provides technology services to more than 8,000 financial institutions. (5/4/09 Tr. (Hawkins) at 219:1-5, 15-17).

2. As of 2004, Metavante provided consumer e-banking services to more than 175 financial institutions. Today, Metavante provides consumer e-banking services to over 250 financial institutions. (5/4/09 Tr. (Hawkins) at 221:11-18, 222:22- 223:10).

3. Metavante makes substantial investments in its technology, including OnLine Account Creation ("OAC") and other products. Metavante invests on average twenty percent or more of its revenues for research and development of its technology. (5/4/09 Tr. (Hawkins) at 227:19- 229:2, 232:10- 233:11).

4. Metavante provides technology services and direct banking services to a variety of financial institution clients, including banks, insurance companies, and credit card companies. (5/4/09 Tr. (Hawkins) at 219:18- 221:7, 221:4-7; Holst Dep. at 105:19-106:21, 214:17- 215:2; PX 418 (transcript of Holst video)).

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* This Appendix omits proposed Findings of Fact and Conclusions of Law that were not adopted by the district court, and shows Conclusions of Law 61, 62 and 63 as modified by the district court.

5. In early 2004, Emigrant decided to outsource the processing services for EmigrantDirect to a third party because it did not have the resources or the expertise to create the system on its own, while also achieving speed-to-market. (5/5/09 Tr. (Morehouse) at 149:25-150:21, 162:23- 163:15, 167:25- 168:10, 218:13-15, 221:3-222:2; 5/5/09 Tr. (Lyon) at 23:22- 24:2; 5/12/09 Tr. (Pocalyko) at 93:7-9; Milstein Dep. at 74:3-16; PX 414).

6. Metavante and Emigrant entered into the written Technology Outsourcing Agreement (the "Agreement") knowingly and voluntarily. The parties are sophisticated and had equal bargaining power. (PX 1, Agreement § 17.11; PX 3; PX 6; PX 8).

7. The parties negotiated the Agreement for months, and did so with the benefit of in-house and outside counsel. Among other things, the parties exchanged drafts in June and July 2004 (*see, e.g.*, PX 7; PX 24; PX 25; PX 274; PX 311), and participated in a series of calls. (5/5/09 Tr. (Morehouse) at 235:15- 236:9; 5/8/09 Tr. (Hickey) at 249:3- 251:4; PX 10; PX 25; Joint Statement of Undisputed Facts ¶¶ 25-31).

8. When Emigrant decided to pursue direct banking, Ted Morehouse (Emigrant's Senior Vice President of Marketing) reached out to Denis Healy (Emigrant's IT director). Mr. Healy responded that Emigrant "couldn't free up the human capital to get this done internally," and that Emigrant "didn't really have any experience in this type of bank." (5/5/09 Tr. (Morehouse) at 150:15-21). Mr. Healy "recommended

Metavante," as he was "quite familiar with them." (*Id.* at 151:23-24, 153:19-20). Mr. Healy "described his experience with Metavante and his awareness that they actually were in this business of direct banking . . . ." (*Id.* at 153:5-7).

9. On March 4-5, 2004, a Metavante sales team met with representatives of Emigrant to discuss a potential relationship. (5/5/09 Tr. (Morehouse) at 158:12-14; 5/6/09 Tr. (Lyon) at 18:1-10; Holst Dep. at 36:3-19, 89:15-18, 91:25- 92:11, 93:1-24, 105:6-21). Metavante viewed the meeting as a fact-finding opportunity, and had no preconceived notion of what products and services might fit Emigrant's needs. (Holst Dep. at 36:3-19, 89:15-18, 91:25-92:11, 93:1-24). A member of Metavante's sales team testified: "We didn't come to them and say, 'here's a direct bank solution, boom, here you are.' It wasn't like that at all." (Holst Dep. at 105:19-21).

10. Metavante subsequently prepared and circulated a "high-level" proposal dated March 19, 2004. (Ex. 1067; Holst Dep. at 133:6, 134:19- 135:9). It was not presented as a final proposal, but instead was the first proposal in an "iterative process." (Holst Dep. at 135:10-24).

11. At Metavante's suggestion, Eileen Lyon (Emigrant's First Vice President of Marketing) called CapitalOne, one of Metavante's customers in the direct banking business. (5/6/09 Tr. (Lyon) at 55:4-10, 56:12-13, 58:20- 62:4; PX 319). Emigrant inquired about Metavante's services, and CapitalOne gave Metavante

a favorable recommendation. (*Id.* at 60:20- 61:19). Emigrant relied on CapitalOne's recommendation when deciding to enter into the Agreement: "They [CapitalOne] were important in terms of giving us a sense that the process, the direct bank that can [sic] CapitalOne had launched was working and that it was performing well, yes." (*Id.* at 61:20- 62:4).

12. On April 23, 2004, Ted Morehouse (Emigrant) sent a memo to Howard Milstein (Emigrant's CEO) about Metavante's proposal. (5/5/09 Tr. (Morehouse) at 149:20-24, 219:7- 220:12). Mr. Morehouse's memo stated: "Attached, per your request, is the Metavante proposal for the direct banking capability we are pursuing. . . . Much of the proposal is boilerplate, extolling the broad capabilities and experience of their organization." (PX 3, at EMI-0014514). The memo, which contained the "most relevant information" for Mr. Milstein, said nothing about scalability or integration. (5/5/09 Tr. (Morehouse) at 220:20- 221:2; PX 3, at EMI-0014514).

13. On July 15, 2004, Mr. Morehouse sent another memo to Mr. Milstein about the status of contract negotiations, stating: "Our preliminary reviews with internal and external counsel suggest that there are no major disagreements or issues that are likely to require extended negotiation. In addition, Metavante has, thus far, accommodated all our requests and been most cooperative." (PX 6, at EMI-0006123).

14. The parties signed the Agreement on August 6, 2004, five months after the meeting on March 4-5, and after months of negotiations involving in-house and

outside counsel, and after Emigrant consulted with a third-party risk assessment company. (Joint Statement of Undisputed Facts ¶¶ 5-7, 25-31).

15. The Agreement did not include any promise by Metavante that EmigrantDirect would have a certain number of customers, or a certain volume of accounts, or a certain amount of deposits, or any number of processed transactions, or any number of completed applications. (PX 1, Agreement; 5/8/09 Tr. (Nebel) at 106:25- 107:15, 140:13-14; 5/12/09 Tr. (Moffat) at 238:20-24). As Mr. Milstein testified, "Those would not have possibly been within the range of things they [Metavante] were asked to promise." (Milstein Dep. at 104:2-15).

16. Nor did the Agreement include any promise of an end-to-end solution. Rather, the Agreement required Metavante to provide only specified Services. (PX 1, Agreement §§ 18.JJ).

17. On July 22, 2004, during contract negotiations, Emigrant's counsel sent Metavante a "list of Emigrant's comments and questions on the Technology Outsourcing Agreement draft received on 7/8/04." (PX 10; Joint Statement of Undisputed Facts ¶¶ 32-36). In particular, Emigrant requested the addition of several representations, including a "proposed new clause C." (*Id.*).

18. Metavante rejected Emigrant's request to make the representations in "proposed new clause C" and

refused to add those representations to the draft Agreement. Emigrant voluntarily entered into the Agreement knowing that Metavante had rejected its request for the representations contained in proposed new clause C. (5/5/09 Tr. (Morehouse) at 236:20- 241:13; 5/8/09 Tr. (Hickey) at 259:23- 261:24; *compare* PX 1, Agreement *with* PX 10 at EMI-0000916 (Emigrant's proposed new clause C); *see also* PX 8, at EMI-0004830; PX 25, at EMI-0005083; *see generally* Joint Statement of Undisputed Facts ¶¶ 32-36).

19. Metavante would not make – and the Agreement does not include – any representation that Metavante would provide "all of the services, products, technology, operations, systems and actions reasonably required for Customer [Emigrant] to achieve its overall business purpose, namely, to provide commercially viable and scalable national online Electronic Banking Services which permit retail customers to open and manage savings accounts and investments in certificates of deposits," as Emigrant had requested in proposed new clause C. (5/5/09 Tr. (Morehouse) at 236:20- 241:13; 5/8/09 Tr. (Hickey) at 259:23- 261:24; *compare* PX 1, Agreement *with* PX 10 at EMI-0000916 (Emigrant's proposed new clause C); *see also* PX 8, at EMI 0004830; PX 25, at EMI-0005083; *see generally* Joint Statement of Undisputed Facts ¶¶ 32-36).

20. Metavante would not make – and the Agreement does not include – any representation that Metavante's system would "provide similar functionality, efficiency, capacity and reliability as those national online services currently offered by ING Direct for savings accounts

and certificates of deposit," as Emigrant had requested in proposed new clause C. (5/5/09 Tr. (Morehouse) at 239:12-25, 240:11-13; 5/8/09 Tr. (Hickey) at 259:23- 261:6; *compare* PX 1, Agreement *with* PX 10 at EMI-0000916 (Emigrant's proposed new clause C); *see also* PX 8, at EMI-0004830; PX 25, at EMI-0005083; *see generally* Joint Statement of Undisputed Facts ¶¶ 32-36).

21. Metavante did not know what Emigrant meant when it said that it wanted a direct bank "like ING." (Holst Dep. at 71:1- 72:5, 143:23- 144:1). Metavante always followed up by asking "what does that mean?" (*Id.* at 71:1-4). Metavante did not receive an answer. (*Id.* at 71:8-12). "Their comment was always [']we want it to look just like ING.['] And our comment was, [']so do you want the orange bouncing balls?['] We didn't know what that meant. But it was always [']just like ING.['] " (*Id.* at 72:2-5).

22. Emigrant personnel informed Mr. Milstein, Emigrant's CEO, that (1) Emigrant had requested a representation in the Agreement about ING; that (2) Metavante had rejected such a provision; and that (3) any such a representation was not part of the Agreement. (Milstein Dep. at 89:8-15).

23. Metavante would not make – and the Agreement does not include – any representation that "Customer [Emigrant] will not have to incur any material costs or fees not specified in this Agreement in order to establish and maintain such fully operational Electronic Banking Services," or that "[t]he Services include, without limitation, (i) all services required for the operation of

deposit operations, customer fulfillment and call center functions," as Emigrant had requested in proposed new clause C. (5/5/09 Tr. (Morehouse) at 236:20- 241:13; *compare* PX 1, Agreement *with* PX 10 at EMI-0000916 (Emigrant's proposed new clause C); *see also* PX 8, at EMI-0004830; PX 25, at EMI-005083; *see generally* Joint Statement of Undisputed Facts ¶¶ 32-36).

24. Emigrant at all times bore the responsibility to identify and manage any risk associated with EmigrantDirect. (5/13/09 Tr. (Hoover) at 56:17- 57:2). If Emigrant had any questions about what functionality or services Metavante would provide, it was Emigrant's obligation to ask clearly and to get clarification.

25. Emigrant did not include key technical people like William Scialabba and John McNally in the contract negotiations to identify and inform Metavante of any particular desired functionalities. (5/11/09 Tr. (Scialabba) at 121:13- 122:20, 164:25- 165:17).

26. On July 12, 2004, Emigrant received a proposal from an independent and objective third party, Core-Teck, to "[r]ecommend and establish 'risk and performance' controls" relating, among other things, to "[r]eviewing [the] Contract" and "[a]ssist[ing] and review[ing] all discussions, as asked and required, related to risk and performance measurements." (PX 20, at EMI-0001000).

27. The Core-Teck proposal was reviewed at the highest levels at Emigrant. (Milstein Dep. at 128:7-9,

129:3-9 (testifying that Emigrant's Chief Administrative Officer, Janet Martin, reviewed the Core-Teck report with Mr. Milstein); 5/13/09 Tr. (Hoover) at 58:6- 63:4).

28. Core-Teck specifically informed and advised Emigrant in writing that, as to EmigrantDirect, "Risk Management is [the] clear and exclusive responsibility of Emigrant." (PX 20, at EMI-0001000).

29. On July 15, 2004, Emigrant received and reviewed the first draft of the Core-Teck Assessment of the Agreement. The Core-Teck Assessment states that the Agreement "is mostly silent" on the "actual online banking application . . . that is offered to Emigrant," and that there is "*no clear mention of the end-to-end solution for 'Emigrant Direct'* i.e. the delivery of the on-line banking application, the reason for getting into this contract!!" (PX 21, at EMI-0000926) (emphasis in original). The Core-Teck Assessment also states that the "proposed contract very clearly states that Metavante will be responsible only for what is signed off in the SLA [Service Level Agreements] and implementation/ conversion plan." (*Id.*).

30. Emigrant read and considered the Core-Teck Report dated July 15, 2004 before contract formation, and knew Core-Teck's recommendations before entering into the Agreement with Metavante. (Joint Statement of Undisputed Facts ¶¶ 37-39; Milstein Dep. at 128:7-9, 129:3-9). Emigrant ultimately decided that Core-Teck "wasn't necessary" and did not adopt CoreTeck's recommendations about the draft Agreement, thereby

assuming the allocation of risk proposed in the Agreement. (Milstein Dep. at 127:22- 129:9; *compare* PX 1, Agreement, *with* PX 21, Core-Teck Report).

31. Emigrant decided not to test EmigrantDirect for 90 days, as its risk assessor, Core-Teck, had recommended. (PX 21, at EMI-0000931-933). Instead, Emigrant launched EmigrantDirect to the public on January 5, 2005. (Joint Statement of Stipulated Facts ¶ 66).

32. Emigrant knew that Metavante's Services and applications were not based on an automated "good funds" model at least as early as September 2004, months before the launch of EmigrantDirect to the general public. (5/5/09 Tr. (Morehouse) at 270:2- 281:19; 5/6/09 Tr. (Lyon) at 97:15- 98:2; 5/6/09 Tr. (McNally) at 188:5-10, 193:3- 217:18; PX 9; PX 25, at EMI-0005087; PX 28, at EMI-0003348; PX 29, at EMI-0003216; PX 32; PX 271; PX 275, at EMI-0029243; PX 289, at EMI-0045776; PX 311, at EMI-0004801; PX 321, at EMI-0094832-833; PX 322, at EMI-0036805; PX 323, at EMI-0030283-284; PX 400, at EMI-0040062; PX 401, at EMI-0040079-080; PX 820; PX 821).

33. The testimony at trial by Emigrant witnesses that they did not know the system lacked an automated balance check was not credible.

34. Emigrant admits that it knew, *before* the launch of EmigrantDirect to the general public in January 2005, that Metavante's Services and applications delivered to Emigrant did not include an automated

"good funds" model. (Joint Statement of Stipulated Facts ¶ 62).

35. Emigrant wanted and accepted Metavante's Services without this automated feature. Emigrant admits that it decided to launch EmigrantDirect to the general public knowing that EmigrantDirect was not based on an automated "good funds" model. (Joint Statement of Stipulated Facts ¶ 63; 5/5/09 Tr. (Morehouse) at 262:18- 263:14, 265:24- 266:4, 266:20-22, 282:1-4; 5/6/09 Tr. (McNally) at 164:23- 169:1; PX 289, at EMI-0045777-778).

36. Emigrant implemented manual procedures to check account balances before EmigrantDirect's launch to the public. (5/6/09 Tr. (McNally) at 135:3- 137:9; Joint Statement of Stipulated Facts ¶ 63). Emigrant believed that the manual checks were sufficient to mitigate any risk of overdrafts. (5/6/09 Tr. (McNally) at 136:24- 137:9, 163:4- 164:1, 177:21- 178:2). According to Emigrant, the risk was "manageable." (5/6/09 Tr. (McNally) at 174:19-23).

37. In December 2004, Emigrant had in place a "good funds" model with manual procedures. EmigrantDirect was a safe and sound "good funds" system in December 2004 – before the launch to the public on January 5, 2005. (5/5/09 Tr. (Morehouse) at 266:8- 267:1, 268:2-25; 5/7/09 Tr. (Wilson) at 37:12-15, 43:11- 44:8).

38. Emigrant decided to launch EmigrantDirect as scheduled on January 5, 2005, without an automated "good funds" model, because it wanted to take advantage of a perceived competitive opportunity in the marketplace. (5/5/09 Tr. (Morehouse) at 266:8- 269:3). Emigrant believed that the benefits of launching in January, 2005 with manual checks for "good funds" outweighed any risks. (5/ /09 Tr. (McNally) at 178:3-180:4).

39. Emigrant did not believe that it had been defrauded when it realized that EmigrantDirect did not include an automated balance check before monies were transmitted. (5/6/09 Tr. (McNally) at 161:3- 162:25). Emigrant's First Vice President, John McNally, testified: "I never said anything about tricked and defrauded." (*Id.* at 168:16-17). "I did not think that we were defrauded." (*Id.* at 162:17). Instead, "we just had a problem which we needed to have [sic] fixed." (*Id.* at 169:1). At that time, Emigrant viewed the lack of an automated check for good funds as an "honest mistake." (*Id.* at 162:21-25).

40. Emigrant personnel did not believe that the "good funds" issue was important enough to bring to the attention of Mr. Milstein, or Emigrant's General Counsel, or Emigrant's Board, before the public launch. (5/6/09 Tr. (Lyon) at 75:24- 76:8; 5/6/09 Tr. (McNally) at 171:17- 172:9, 173:19- 174:23; 5/8/09 Tr. (Hickey) at 278:5-17; PX 73).

41. Emigrant has not proven any damages relating to the "good funds" issue. (5/6/09 Tr. (McNally) at 176:1-177:6; 5/12/09 Tr. (Pocalyko) at 75:5-21).

42. At Emigrant's request, Metavante put in place automated enhancements to prevent overdrafts, and did so for free. (5/5/09 Tr. (Morehouse) at 283:23-25). Metavante implemented the enhancements in stages, and the fully automated system was put in place by June 2005. (5/5/09 Tr. (Morehouse) at 282:5- 284:12; 5/6/09 Tr. (McNally) at 220:11- 222:14; 5/7/09 Tr. (Wilson) 38:25-39:11; 5/8/09 Tr. (Hickey) at 280:24- 282:5).

43. The parties resolved the "good funds" issue by June 2005. (*Id.*). Nonetheless, almost one year later, Emigrant sent a notice of termination, citing the "good funds" issue as a primary reason for the termination. (5/5/09 Tr. (Morehouse) at 283:4- 284:10; 5/8/09 Tr. (Hickey) at 231:3-11, 280:24- 283:3, 284:12-21; PX 184; PX 820).

44. The Agreement includes a Service Level Schedule that set standards for Metavante's performance. The agreed-upon Services Levels included "E-Banking Services," "Core Services" (consisting of the Deposit System and Customer Information System), "Critical Batch Report Delivery," "Customer Operations Center," "On-Line Response Time," "Business Intelligence Center/Data Warehouse," and "ACH Processing." (PX 1, Agreement at 22-24).

45. The Service Level Schedule did not become applicable until February 2005, 60 days after the "Friends and Family" test period. (Emigrant's Proposed Finding of Fact ¶ 203 (4/29/09)).

46. Metavante tracked Service Levels using the Service Delivery Index ("SDI"), and compiled them in monthly Service Level Reports. Metavante provided those reports to Emigrant. (5/4/09 Tr. (Paschke) at 61:17-62:17, 63:8- 64:14).

47. Emigrant did not identify any Service Level Reports that it wanted but did not receive from Metavante. (5/7/09 Tr. (Romano) at 166:25- 167:15).

48. Metavante satisfied the Service Level requirements in the Agreement. From February 2005 through July 2006, during the parties' relationship, Metavante's performance consistently met or exceeded the agreed-upon Service Levels. (5/4/09 Tr. (Paschke) at 59:12- 93:12, 121:17- 122:2, 216:22- 217:5; 5/8/09 Tr. (Nebel) at 167:13-19, 167:24- 168:3, 169:1-6, 169:10-13, 170:3-9, 179:10-11, 179:21-24, 180:2-4, 180:10-23, 185:17-24; 5/12/09 Tr. (Moffat) at 215:16-25, 222:2-7; PX 105; PX 800-809; PX 825).

49. For example, for consumer e-banking ("CeB"), Metavante achieved an overall performance level of 99.74%, well above the agreed-upon Service Level of 98%. (PX 800; PX 801). Metavante exceeded the Service Level for consumer e-banking during every month of the parties' relationship. (*Id.*).

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50. The overall performance of Metavante's Services exceeded 99% during the parties' relationship. (5/4/09 Tr. (Paschke) at 93:13-21; PX 800).

51. According to Emigrant's own expert, Metavante's overall performance was 98.7% for E-Banking Services, even before correcting errors in his report. (5/8/09 Tr. (Nebel) at 169:1-22, 175:14- 180:2-23; PX 825). The E-Banking Services platform included the applications for Online Account Creation ("OAC"), Consumer-eBanking ("CeB"), and TekAdmin. (5/8/09 Tr. (Nebel) at 159:17-20).

52. Metavante's expert reached the same conclusion: Metavante achieved an overall performance in excess of 98.75% for E-Banking Services. (5/12/09 Tr. (Moffat) at 223:5-12).

53. On September 21, 2005, Emigrant sent Metavante a letter complaining about Metavante's "up-time." (Ex. 1332, at MVNT388580). According to Emigrant, Metavante's Service Level availability percentage was 98.4%, not 99.9%. (Ex. 1332, at MVNT388582; 5/8/09 Tr. (Nebel) at 184:8- 186:6). Either way, the overall availability for the first nine months of EmigrantDirect exceeded the 98% Service Level for E-Banking Services.

54. During the 18 months from February 2005 to July 2006, Metavante had opportunities to make or miss the seven Service Levels 126 times (18 months x 7 Service Levels = 126). (PX 800-809). During that period,

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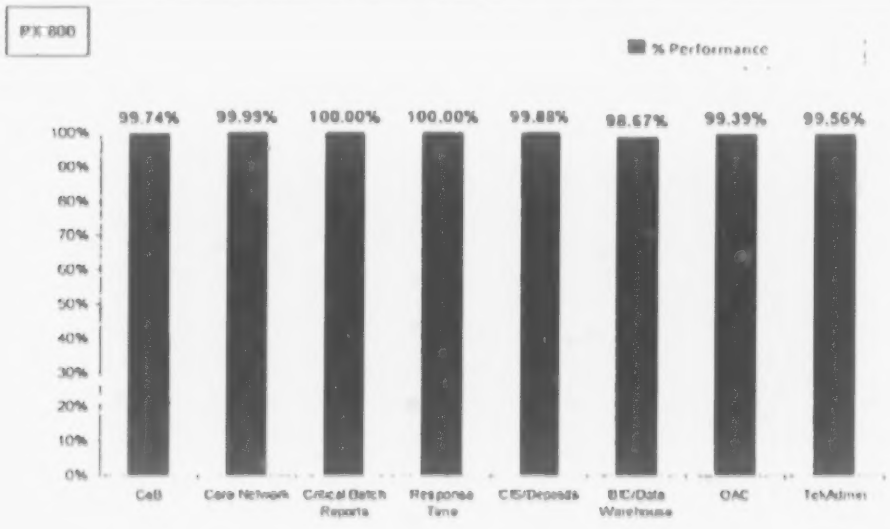
Metavante met or exceeded the Service Levels 120 out of 126 times. (PX 800-809).

55. Any miss of a particular Service Level was isolated and minimal. For example, in July 2005, Metavante had a Service Level for CIS availability of 98.99%, missing the Service Level by only 0.01% and prompting no complaint by Emigrant. (5/4/09 Tr. (Paschke) at 84:5-15).

56. Metavante did not miss any Service Level during two consecutive months. (PX 801-809; PX 825; 5/8/09 Tr. (Nebel) at 170:3-9; 5/12/09 Tr. (Moffat) at 221:13-222:1, 222:8-10).

57. The following chart reflects Metavante's Service Level performance under the Agreement:

Metavante Service Performance
January 2005 – July 2006



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58. Instead of considering Metavante's overall Service Level performance during the parties' relationship, Emigrant's expert considered Metavante's performance under only one of the seven Service Levels (E-Banking Services). (5/8/09 Tr. (Nebel) at 158:13-161:9; 5/12/09 Tr. (Moffat) at 219:1-3, 219:10-24, 220:12-15; PX 1, Agreement, Service Level Schedule § II.F).

59. The Parties agree that overall Metavante exceeded the 98% Service Level for E-Banking Services:

Paschke (Metavante)	99+%
Moffat (Metavante's expert)	98.79%
Nebel (Emigrant's expert)	98.75%
Romano (Emigrant)	98.4%

(5/4/09 Tr. (Paschke) at 93:13-18; 5/7/09 Tr. (Romano) at 174:23- 175:3; 5/8/09 Tr. (Nebel) at 169:1-6, 180:14-20, 184:8-14; 5/12/09 Tr. (Moffat) at 223:5-12; PX 800; PX 825; Ex. 1332, at MVNT388582).

60. Metavante provided Services to Emigrant and performed its obligations under the Agreement in good faith. Metavante diligently worked with Emigrant in good faith to address any issues that arose. (5/4/09 Tr. (Paschke) at 108:15- 109:1; 5/5/09 Tr. (Hurdis) 17:1- 19:3; 5/11/09 Tr. (Scialabba) at 139:22-25; 140:8-11). According to Emigrant, Metavante was "professional" and "genuine about working" through problems. (5/11/09 Tr. (Scialabba) at 133:8-10).

61. Any alleged issues were a result of mistakes or miscommunications. (5/6/09 Tr. (McNally) at 161:22-162:23).

62. If there was any error in processing data, or the preparation or filing of a report, form or file, Metavante accurately re-processed the data (unless Emigrant instructed Metavante not to do so), or prepared or filed an accurate report, form, or file in accordance with the terms of the Agreement. (5/4/09 Tr. (Paschke) at 94:5-110:5; 5/11/09 Tr. (Scialabba) at 138:5-15; PX 269).

63. Metavante corrected any Service Level misses or issues affecting EmigrantDirect in accordance with the terms of the Agreement. (5/4/05 Tr. (Hawkins) at 231:19- 232:9; 5/4/09 Tr. (Paschke) at 94:5- 110:5, 121:17-122:2; 5/6/09 Tr. (McNally) at 223:4- 224:18; PX 105; PX 269; PX 1, Agreement §§ 8.2, 16.3, 4.6.C). Metavante resolved the vast majority of issues on the same day that they were reported. (5/4/09 Tr. (Paschke) at 108:15-109:12).

64. During an Emigrant Board of Directors meeting on September 27, 2005, one director raised a question about "some technological issues that occurred with EmigrantDirect." (PX 104, at EMI-0076814; 5/6/09 Tr. (McNally) at 224:8-18; 5/8/09 Tr. (Nebel) at 129:13- 130:3; Milstein Dep. 212:3-10, 215:8-21). Mr. Milstein "responded that most of these issues had been worked out with Metavante." (*Id.*; *see also* 5/8/09 Tr. (Hickey) at 235:4-8).

65. Metavante cured any and all purported material breaches of the Agreement before receiving Emigrant's termination letter dated May 3, 2006.

66. Metavante provided Services in a commercially reasonable manner in material conformance with the terms of the Agreement. (5/12/09 Tr. (Moffat) at 227:9-16, 228:8-12, 239:20-23, 248:13-18, 257:7-10; PX 1, Agreement § 6.1; *see infra*).

67. Emigrant's expert made no attempt to compare the performance of EmigrantDirect to the performance of any other direct bank when evaluating whether Metavante provided Services in a commercially reasonable manner. (5/8/09 Tr. (Nebel) at 143:15- 148:9-13).

68. Emigrant's expert did not consider the commercial success of EmigrantDirect when evaluating whether Metavante performed in a commercially reasonable manner. (5/12/09 Tr. (Moffat) at 240:5-18). Emigrant's expert "[r]eally could not care less" about the commercial success of EmigrantDirect. (5/5/09 Tr. (Nebel) at 105:16- 106:2; *see also id.* at 107:16- 116:6). In fact, Emigrant's expert gave an opinion about commercial reasonableness without even considering how well EmigrantDirect did in achieving its commercial goals and purpose. (5/5/09 Tr. (Nebel) at 115:23- 116:6).

69. Perhaps the best evidence that Metavante provided Services in a commercially reasonable manner is the fact that Emigrant inquired about the possibility

of doing still more business with Metavante in October 2005, more than ten months after launching EmigrantDirect. (5/5/09 Tr. (Hurdis) at 21:25- 24:16; 5/6/09 Tr. (McNally) at 225:25- 226:15; PX 83; PX 324).

70. Although Ms. Romano testified at trial that Metavante's Services were unsatisfactory from January 2005 until July 2006 (5/7/09 Tr. (Romano) at 170:8-9), according to Mr. McNally Ms. Romano is the one who approved the idea of asking Metavante to provide additional services for a possible EmigrantDirect business account. (5/6/09 Tr. (McNally) at 226:19-23). Ms. Romano's trial testimony was not credible.

71. Metavante provided Services to Emigrant under the Agreement, and Emigrant benefited from those Services. EmigrantDirect became a smash success, and did so using Metavante's Services. EmigrantDirect would not have been able to achieve that level of commercial success if Metavante had failed to perform the Services in a commercially reasonable manner. (5/5/09 Tr. (Hurdis) at 14:24- 15:7; 5/12/09 Tr. (Moffat) at 223:17- 224:7, 228:8-12, 234:16-20, 238:17-20, 239:4-8, 248:7-12, 257:7-10).

72. Using Metavante's Services, EmigrantDirect proved to be highly successful. In fact, EmigrantDirect was far more popular among consumers than Emigrant had anticipated. EmigrantDirect attracted significantly more accounts, customers, and deposits than Emigrant ever expected or projected. (5/4/09 Tr. (Hawkins) at 230:19- 231:4, 231:19- 232:9; 5/5/09 Tr. (Hurdis) at 12:1-13:4, 18:13- 19:11, 44:16-25; 5/5/09 Tr. (Morehouse) at

252:1-14; 5/8/09 Tr. (Hickey) at 262:10- 263:13; 5/12/09 Tr. (Moffat) at 229:17-25, 230:5-10; PX 811).

73. The Agreement sets forth Emigrant's own account and volume projections for EmigrantDirect. Emigrant prepared those projections, and provided them to Metavante. (PX 1, Agreement at 21, "Solution Assumptions"; 5/4/09 Tr. (Hawkins) at 230:10-18; 5/5/09 Tr. (Hurdis) at 12:11-15). Metavante was entitled to rely on Emigrant's projections. (5/8/09 Tr. (Nebel) at 124:7-125:4).

74. Emigrant projected a total of 12,941 customers (for both savings accounts and certificates of deposit) in the first year of the Agreement; 38,824 customers in the second year of the Agreement; and 86,190 customers in the third year of the Agreement. (*Id.*; *see also* Joint Statement of Stipulated Facts ¶ 71; 5/4/09 Tr. (Hawkins) at 230:10-18).

75. Using Metavante's Services, EmigrantDirect acquired more than 257,000 new accounts and nearly $6.7 billion in deposits in fewer than 19 months (*see* Joint Statement of Undisputed Facts ¶ 73) – significantly more accounts and deposits than Emigrant projected in the Agreement or internally. (PX 92; PX 249, at EMI-0130706, 28, 30; PX 298, at EMI-0073745, 747; PX 812; 5/5/09 Tr. (Morehouse) at 252:6-10; 5/8/09 Tr. (Nebel) at 113:10-14; Milstein Dep. 358:16- 359:8, 359:11- 360:14).

76. In the first five months, EmigrantDirect acquired nearly the number of accounts that Emigrant

had projected it would acquire by the end of year three of the Agreement. (5/8/09 Tr. (Nebel) at 124:3-6; PX 92).

77. In fact, EmigrantDirect acquired more savings account deposits using Metavante's Services than Emigrant had acquired in its entire 150-year history as a savings bank. (5/8/09 Tr. (Nebel) at 109:8-11; PX 325; PX 414; PX 813; Milstein Dep. at 360:19- 361:11).

78. Emigrant would have had to "open 350 branches to bring in the amount of money Emigrant accumulated through its online operation." (Milstein Dep. at 360:19-361:11).

79. From January 2005 to July 31, 2006, the largest portion of Emigrant's total savings deposits came from EmigrantDirect. (Milstein Dep. at 275:4-19; *see* PX 85, at EMI-0095756; PX 91, at EMI-0096209). Deposits from EmigrantDirect constituted the largest portion of Emigrant's total deposits. (Milstein Dep. at 276:17-277:3).

80. As Emigrant's General Counsel testified, "There's no question that in terms of the deposits received that Emigrant was a success, yes." (5/8/09 Tr. (Hickey) at 262:24-25).

81. EmigrantDirect processed millions of transactions using Metavante's Services. (5/12/09 Tr. (Moffat) at 237:13- 238:1; 5/8/09 Tr. (Nebel) at 114:12-17).

82. Metavante's Services were integrated and highly scalable, as demonstrated by the number of accounts and transactions, the amount of deposits, and the overall ability of Metavante's system to vastly exceed Emigrant's own projections. (5/4/09 Tr. (Paschke) at 93:18- 94:4; 5/12/09 Tr. (Moffat) at 233:11-22, 234:7-15, 247:22- 248:6, 275:16-18; Holst Dep. at 150:12-15, 151:10-11).

83. EmigrantDirect deposits were rate sensitive. (5/12/09 (Pocalyko) at 4:2-7; 5/14/09 Tr. (Lawton) at 11:24-14:14).

84. Emigrant had limitations on its ability to invest in longer-term high yielding investments. (5/12/09 Tr. (Pocalyko) at 112:14-21).

85. Mr. Milstein touted the success of EmigrantDirect in a series of reports to Emigrant's Board of Directors, as reflected in the Board minutes. (5/8/09 Tr. (Nebel) 117:6- 132:4; PX 104, at EMI-0076745, 76758, 76768, 76777, 76784, 76787, 76813, 76814, 76817, 76823, 76837, 76851, 76867, 76885, 76890, 76900, 76907, 76915).

86. During a Board meeting on January 25, 2005, Mr. Milstein reported to the Board that actual deposits in EmigrantDirect since the public launch on January 5, 2005, totaled more than $38 million. (PX 104, at EMI-0076745; 5/8/09 Tr. (Nebel) at 117:21- 120:15; Milstein Dep. at 203:13- 204:10). Mr. Milstein "advised the board that the results thus far have been better than

anticipated and are expected to increase with deposits pending." (*Id.*).

87. During a Board meeting on February 15, 2005, Mr. Milstein reported to the Board that "EmigrantDirect deposits currently total approximately [$]300 million." (PX 104, at EMI-0076758; 5/8/09 Tr. (Nebel) at 120:16- 121:4; Milstein Dep. at 204:20- 205:6). He added that EmigrantDirect "is well ahead of schedule for receiving deposits," and that the "results have been very impressive thus far." (PX 104, at EMI-0076756; Milstein Dep. at 205:18- 206:3).

88. During a Board meeting on May 17, 2005, the Board was informed that "total deposits improved by [$]2.1 billion," and that the "large increase was due mainly to the success of the EmigrantDirect initiative." (PX 104, at EMI-0076777; 5/8/09 Tr. (Nebel) at 122:9-21; Milstein Dep. at 208:4-16). EmigrantDirect accounted for a large increase of deposits to Emigrant. (PX 104, at EMI-0076777; Milstein Dep. at 209:4-16).

89. During a Board meeting on September 27, 2005, Mr. Milstein reported that "new accounts totaled 111,788," and that "deposits total $3,635,000,000." (PX 104, at EMI-0076813; 5/8/09 Tr. (Nebel) at 128:25- 129:12; Milstein Dep. at 214:4-11).

90. During the Board meeting on April 25, 2006, Mr. Milstein "reported that earlier this year Emigrant Direct had lost approximately $300 million in deposits due to the promotional interest rates that were offered,

beginning in January, by ING Direct and HSBC." (PX 104, at EMI-0076888; Milstein Dep. at 249:10-22). ING and HSBC increased their interest rates and caused some attrition to EmigrantDirect. (PX 104, at EMI-0076888; Milstein Dep. at 250:3-6).

91. During the Board meeting on May 23, 2006 – weeks *after* sending Metavante a notice of termination – Mr. Milstein reported that EmigrantDirect had attracted approximately $6.5 billion in deposits, and that EmigrantDirect was a continued success. (5/8/09 Tr. (Nebel) at 131:12- 132:4; PX 104, at EMI-0076896).

92. Emigrant's Board minutes say nothing about Emigrant being "defrauded" by Metavante. The omission is significant because the Board minutes do include reports of fraud committed by third parties. (5/8/09 Tr. (Hickey) at 235:15 -236:6, 237:23- 240:11; PX 104, at EMI-0076765, 0076769, 0076833, 0076897-898). Instead, Mr. Milstein continued to label EmigrantDirect a success to the Board even after Emigrant purported to terminated the Agreement for Cause. (5/8/09 Tr. (Nebel) at 117:6- 133:24).

93. Emigrant itself proclaimed EmigrantDirect a huge success. Emigrant repeatedly represented and advertised to the general public that EmigrantDirect's American Dream Savings Account was "the fastest growing and most successful Internet bank in the country." (PX 86; PX 70; 5/5/09 Tr. (Hurdis) at 13:5- 14:15; 5/5/09 Tr. (Morehouse) at 252:24- 253:23, 256:11- 257:21, 258:23-25). Emigrant also represented and advertised

that EmigrantDirect provided "excellent service." (5/5/09 Tr. (Morehouse) at 255:10-16; PX 70).

94. Emigrant admitted that no direct bank grew as fast or was more successful than EmigrantDirect. (5/5/09 Tr. (Morehouse) at 257:5-15).

95. The advertisements were truthful and accurate, and Emigrant is not aware of any respect in which they were incorrect or inaccurate. (5/5/09 Tr. (Morehouse) at 256:11- 257:21, 258:23-25; Milstein Dep. at 298:11-16, 298:25- 300:5). "[Emigrant] wouldn't write it if it wasn't true." (Milstein Dep. at 324:17- 325:15).

96. Emigrant never warned consumers not to use EmigrantDirect, nor warned them that there was any problem with EmigrantDirect. (5/5/09 Tr. (Morehouse) at 259:24- 260:21; Milstein Dep. at 298:25- 300:5). As Mr. Milstein testified, "Why would we do that?" (*Id.*).

97. Emigrant issued press releases stating that EmigrantDirect "has attracted more than 225,000 customers and [$]6 billion in deposits since opening in January 2005 making it the fastest growing internet bank in the country." (Milstein Dep. at 320:20- 321:5, 321:17- 322:15; 5/5/09 Tr. (Hurdis) at 13:24- 14:15; PX 86, at 1, 2, 4, 6, 8).

98. The commercial success of EmigrantDirect was unprecedented. Mr. Milstein testified that he was not aware of any direct bank, other than EmigrantDirect, that acquired more than $1 billion in savings account

deposits in its first four months, or more than $7 billion in savings account deposits in its first eighteen months. (Milstein Dep. at 311:15-25, 312:20- 313:6).

99. Emigrant's Chief Administrative Officer, Janet Martin, publicly admitted the unprecedented success of EmigrantDirect:

> EmigrantDirect, um, is an anomaly in the banking world. We are an amazing success story. Nothing like this has ever happened in the history of banking. And that's not saying from me. ***This is the truth***. This is it.
>
> Nobody has ever created a bank like this that has gotten close to $6 billion dollars in less than a year. That's an amazing number. That's huge.
>
> When you look at all of Emigrant Savings Bank, the Bank from 1850 until now, we have $4 and a half billion dollars, four point five billion on deposit and EmigrantDirect in one year we have $6 billion dollars. Stop and think about that for a minute, okay. I mean just like, like let that sort of sink in here.
>
> What we have done is absolutely incredible. When we started it we kind of thought well let's just see what's happening out in that Internet world. And that's kind of where we were out there and it was uh, you know one of

> those sort of things we felt was going to be hit or miss.
>
> We didn't build the product in-house. What we decided we would do is outsource it. So we contracted a third-party kind of provider and they built this whole infrastructure and everything for us and we contracted with them to house this. The problem, well on the good side it wasn't very expensive to do it that way and we figured well if it works you know we'll come up with another plan but we didn't think it was going to be this successful and if it doesn't work how much money did we lose. Not much at all.
>
> As it turns out we were immensely successful. We are now, as of last May we were actively working to build our own website so that we can take it off of our third-party vendor, bring this thing in-house, and have more control over what we can do.

(PX 325; PX 414 (emphasis added)).

100. Emigrant touted the success of EmigrantDirect to the industry. Emigrant prepared a narrative about EmigrantDirect to support Mr. Milstein's nomination as "Banker of the Year." (5/5/09 Tr. (Morehouse) at 260:22- 261:5; PX 80). Emigrant's narrative admitted that EmigrantDirect had attracted "more than 60,000 new customers, reflecting consumer participation from all 50 states." (PX 80, at EMI-0084026; Milstein Dep. at 328:22- 329:7, 329:25- 330:4).

Appendix D

101. Emigrant's narrative claimed that "[t]he immediate success of EmigrantDirect's 'American Dream Savings Account' confounded the banking industry at a time when Dutch- based ING Direct had gained a substantial and dominating beachhead in the US through its internet offering." (PX 80, at EMI-0084026; Milstein Dep. at 327:3- 328:8).

102. According to Emigrant's narrative, Mr. Milstein "leveraged Emigrant's stronger balance sheet, its lean cost structure and a nimble, internet-based advertising strategy to blast past ING . . . ." (PX 80, at EMI-0084026). EmigrantDirect was "one of the most efficient deposit-generating banks in the country." (*Id.*).

103. The year 2005 was described as a "Year of Excellence" for EmigrantDirect by its advertisement placement company. (Milstein Dep. at 313:13- 315:21, 320:8-14; *see* PX 94, at 1). The document stated: "Unbelievable! $6 Billion in the first year!" (PX 94, at 16).

104. A case study by Flying Point Media described EmigrantDirect as "one of the most successful product launches in the financial services industry in 2005." (PX 68, at 2).

105. The Online Banking Report featured EmigrantDirect in its list of the "Best of 2005," and declared that it was the number one (tied for first) most significant innovation and development of 2005. (PX 84, at 12). According to the Online Banking Report, EmigrantDirect was "the next ING Direct" in the banking industry. (*Id.*, at 12).

106. The parties discussed a number of issues during the course of their relationship. Despite complaining about the system from time to time, Emigrant continued to use and benefit from Metavante's Services, claiming that EmigrantDirect was a huge success. (5/5/09 Tr. (Hurdis) at 19:22- 21:24, 24:23- 25:6).

107. In November, 2005, Metavante sent Emigrant a notice of termination for its failure to pay for Metavante's Services under the Agreement, but gave the requisite 30-day cure period. Emigrant subsequently paid the particular invoices in question. (5/5/09 Tr. (Hurdis) at 20:15-24, 25:15- 26:1, 26:12-15; 5/5/09 Tr. (Daroga) at 139:11-14).

108. Emigrant has not paid in full the invoices for April, May, June, and July, 2006. (5/5/09 Tr. (Daroga) at 139:15-21; *see also* Joint Statement of Undisputed Facts ¶¶ 91-92).

109. Emigrant received and used the Services that Metavante provided in April, May, June, and July, 2006. (5/5/09 Tr. (Hurdis) at 27:21- 28:5).

110. Emigrant sent Metavante a notice of termination on May 3, 2006. (PX 184). Emigrant's May 3 letter was the first time that Emigrant had sought to terminate the Agreement for Cause. (5/5/09 Tr. (Hurdis) at 26:12-15; 5/5/09 Tr. (Daroga) at 100:10-19, 102:6-10, 121:23- 122:22; 5/8/09 Tr. (Hickey) at 282:15- 283:3).

Appendix D

111. Emigrant's May 3, 2006 termination letter did not provide any opportunity for Metavante to cure. (5/5/09 Tr. (Daroga) at 102:11- 103:5; 5/8/09 Tr. (Hickey) at 224:17-23, 258:15- 259:5). Instead, Emigrant declared that any alleged issues could not be cured at all. (PX 184, at MVNT-001308; PX 185, at 1; 5/5/09 Tr. (Daroga) at 101:16-25).

112. After sending its May 3 termination letter, Emigrant did not allow Metavante an opportunity to cure any purported problems, even though Metavante exceeded all Services Levels in the Agreement in both June and July 2006, and there were no issues or problems in those months. (5/4/09 Tr. (Paschke) 91:9-11, 92:20-21, 108:2-16; 5/5/09 Tr. (Daroga) at 102:11- 103:5, 103:25- 104:3; 5/14/09 Tr. (Paschke) 91:9-11, 92:20-21, 108:2-16; PX 185, at 1; PX 800-809). Emigrant unilaterally terminated the Agreement as of July 21, 2006 without allowing any opportunity for cure. (5/5/09 Tr. (Daroga) at 102:11- 103:5).

152. Under the Agreement, Metavante provided Services to Emigrant, and Emigrant benefited from those Services. Metavante invoiced Emigrant for the Services that it provided. (5/5/09 Tr. (Hurdis) at 21:8-20, 28:15-20).

153. Metavante invoiced Emigrant for the Services that Metavante provided in April, May, June, and July 2006, before Emigrant terminated the Agreement. (5/5/09 Tr. (Hurdis) at 27:2 - 28:20; PX 181).

154. Metavante provided, and Emigrant accepted, the Services set forth in Metavante's invoices for April, May, June and July 2006. (5/5/09 Tr. (Hurdis) at 28:15-20).

155. Emigrant has never paid Metavante in full for the Services set forth on the invoices for April, May, June and July 2006. (Joint Statement of Undisputed Facts ¶ 92). The unpaid processing fees for the Services set forth on Metavante's invoices for April, May, June and July 2006 total $1,773,641.13. (5/5/09 Tr. (Hurdis) at 26:16-18, 27:2-6, 27:15- 28:1, 28:10-20, 30:11-14, 31:4-8; PX 181, at MVNT-388228; PX 318).

161. The Agreement provides that "Customer [Emigrant] shall also pay any collection fees, court costs, reasonable attorneys' fees, and other fees, costs, and charges incurred by Metavante in collecting payment of the charges and any other amounts for which Customer [Emigrant] is liable under the terms and conditions of this Agreement." (5/5/09 Tr. (Hurdis) at 31:10-23; PX 1, Agreement §§ 5.5, 17.8).

ADOPTED PROPOSED CONCLUSIONS OF LAW

1. The Agreement is a fully integrated contract that governs the relationship between Metavante and Emigrant.

2. The Agreement constitutes the entire agreement between Metavante and Emigrant with respect to its subject matter, and supersedes all prior negotiations, agreements, and undertakings between the parties. *See* Agreement § 17.2.

3. The parties amended the Agreement in writing on December 14, 2004, and again on February 1, 2005.

4. The Agreement is governed by Wisconsin law. *See* Agreement § 17.1.

5. The Agreement is valid and enforceable under Wisconsin law. Emigrant admitted in its proposed conclusions of law: "The Agreement was a valid and enforceable contract between Metavante and Emigrant." *See* Emigrant's Proposed Findings of Fact and Conclusions of Law ¶ 15, at 58 (4/29/09).

6. The terms of the Agreement are unambiguous.

7. Under the Agreement, Metavante agreed to provide, and Emigrant agreed to pay for, the "Services" specified in the Agreement. *See* PX 1, Agreement at 1.

8. Metavante did not have a contractual obligation to provide any services to Emigrant, except those Services specifically identified in the Agreement itself. *See* PX 1, Agreement §§ 4.3 - 18.LL.

9. The Agreement defines the Services that Metavante agreed to provide under the contract, including "Implementation of Services," "Initial Services," "Professional Services," "Service Levels," "Electronic Banking Services," and "ACH Services." *See* PX 1, Agreement § 4.

10. The Agreement also includes a series of schedules. The schedules include the "Services and Charges Schedule," the "Service Level Schedule," the "Implementation Plan Schedule," the "Termination Fee Schedule," and the "Strategic Network Solutions Schedule." *See* PX 1, Agreement.

11. The parties agreed that "Services Levels, if any, relating to a particular Service shall be as set forth in the Service Level Schedule." *See* PX 1, Agreement § 4.4.

12. The parties also agreed that "Metavante's performance of Services at a level at or above any Service Level shall be satisfactory performance." *See* PX 1, Agreement § 4.4.

13. The Service Level Schedule does not require that end users be able to use online banking services 100% of the time. Rather, for example, "[t]he Service Level for e-Banking applications is ninety-eight percent (98%) Availability during each Availability Period . . . ." *See* PX 1, Agreement, Service Level Schedule II.F. Likewise, "[t]he Service Level for On-line System Availability for the Core Services [*i.e.*, the Deposit System and Customer Information System] is ninety-nine percent (99%)." *See* PX 1, Agreement, Service Level Schedule II.A.

14. Emigrant had a contractual obligation to pay for the Services provided by Metavante. Specifically, Emigrant agreed to "pay fees for the Initial Services as set forth in the Services and Charges Schedule." *See*

PX 1, Agreement § 5.1. In addition, Emigrant agreed to pay the One Time Fees and Monthly Fees for processing set forth on the Services and Charges Schedule. *See id.* at 18-20.

15. The Agreement provides that a failure to pay by Emigrant is a material breach of the Agreement: "The parties acknowledge and agree that a failure to pay any amount when due hereunder shall be a Default that is capable of being cured within thirty (30) days." *See* Agreement § 8.2; *see also id.* ("If either party fails to perform any of its material obligations under this Agreement (a 'Default') . . . .").

16. The Agreement provides that Metavante "will provide all Services in a commercially reasonable manner in material conformance with the applicable Documentation and this Agreement (the 'Performance Warranty'). Where the parties have agreed upon Service Levels for any aspect of Metavante's performance, *such Service Levels shall apply in lieu of the Performance Warranty.*" *See* PX 1, Agreement § 6.1 (emphasis added).

17. Metavante did not have a contractual duty to provide "commercially reasonable" services. Rather, Metavante had a contractual duty to provide the Services expressly identified in the Agreement, and do so in a "manner" that was "commercially reasonable." *Id.*

18. The "commercially reasonable manner" standard does not apply to Services that are governed by Service Levels. "Where the parties have agreed upon Service Levels for any aspect of Metavante's performance, such Service Levels shall apply in lieu of the Performance Warranty." *See* PX 1, Agreement § 6.1.

19. There is no other performance warranty under the Agreement. The parties expressly agreed that "METAVANTE DISCLAIMS ANY AND ALL OTHER WARRANTIES, CONDITIONS, OR REPRESENTATIONS (EXPRESS OR IMPLIED, ORAL OR WRITTEN) WITH RESPECT TO THE SERVICES PROVIDED UNDER THIS AGREEMENT . . . ." *See* PX 1, Agreement § 6.3.

20. Nothing in the Agreement required Metavante to provide any Services using a "good funds" model. The term "good funds" does not appear anywhere in the Agreement. *See* PX 1, Agreement.

21. Nothing in the Agreement stated, represented or promised that Metavante's Services would have a certain measure of scalability. *See* PX 1, Agreement.

22. Nothing in the Agreement stated, represented or promised that Metavante's Services would have a certain measure of integration. *See* PX 1, Agreement.

23. Nothing in the Agreement stated, represented or promised that Metavante's Services would lead to Emigrant having a certain number of customer

accounts. *See* PX 1, Agreement; 5/8/09 Tr. (Nebel) at 107:7-10.

24. Nothing in the Agreement stated, represented or promised that Metavante's Services would lead to Emigrant having a certain amount of customer deposits. *See* PX 1, Agreement; 5/8/09 Tr. (Nebel) at 106:17- 107:6.

25. Nothing in the Agreement stated, represented or promised that Metavante's Services would lead to Emigrant having a certain level of capacity. *See* PX 1, Agreement.

26. Nothing in the Agreement stated, represented or promised that Metavante's Services would allow or perform a certain number of completed transactions or applications. *See* PX 1, Agreement; 5/8/09 Tr. (Nebel) at 107:7-15).

27. The Agreement includes an Initial Term of five years. *See* PX 1, Agreement at 1.

28. The Agreement imposes requirements for terminating the Agreement for Cause and for seeking Damages based on a Default by the other party (defined in the Agreement as a party's failure to perform its "material obligations" under the Agreement). *See* PX 1, Agreement § 8.2. A party can terminate the Agreement based on an alleged Default by the other party and/or seek Damages only if the non-defaulting party complies with the requirements of Section 8.2 of the Agreement. *See* PX 1, Agreement § 8.2.

29. The requirements of Section 8.2 of the Agreement create conditions precedent to the termination of the Agreement for Cause and the recovery of any Damages.

30. The Agreement includes four prerequisites before a non-defaulting party can terminate the Agreement for Cause and/or seek Damages: (1) a material breach by the party in Default; (2) a notice of termination; and (3) a subsequent opportunity to cure; and (4) failure to cure the material breach. "If either party fails to perform any of its material obligations under this Agreement (a 'Default') and does not cure such Default in accordance with this Section, then the non-defaulting party may, by giving notice to the other party, terminate this Agreement as of the date specified in such notice of termination, or such later dated agreed to by the parties, and/or recover Damages." *See* PX 1, Agreement § 8.2.

31. After sending a notice of termination, the non-defaulting party must give the defaulting party an opportunity to cure an alleged Default within 30 days. If the alleged Default is not capable of being cured within 30 days, then the defaulting party must be afforded an opportunity to implement a plan to cure the alleged Default within 30 days and subsequently carry out that plan: "A party may terminate the Agreement in accordance with the foregoing if such party provides written notice to the defaulting party and either (a) the defaulting party does not cure the Default within thirty (30) days of the defaulting party's receipt of notice of

the Default, if the Default is capable of cure within thirty (30) days, or (b) if the Default is not capable of cure within thirty (30) days, the defaulting party does not both (i) implement a plan to cure the Default within thirty (30) days of receipt of notice of the Default, and (ii) diligently carry-out the plan in accordance with its terms." *See* PX 1, Agreement § 8.2.

32. A breach of the Agreement cannot provide a basis for termination of the Agreement and the recovery of Damages unless the breach is material. *See* PX 1, Agreement § 8.2.

33. Under the Agreement, a party cannot terminate the Agreement for Cause and cannot seek Damages without providing the defaulting party with notice, followed by an opportunity to cure. *See* Agreement § 8.2.

34. Nothing in the Agreement allows a party to declare the other party in material breach and declare that the alleged breach or problem is incurable without providing an opportunity to cure.

35. A party cannot terminate the Agreement for Cause and cannot seek Damages based on any alleged Default unless the basis for the alleged Default is specified in the written notice of termination. *See* PX 1, Agreement § 8.2.

36. A party cannot terminate the Agreement for Cause and cannot seek Damages based on any alleged Default that was cured. *See* PX 1, Agreement § 8.2. The parties expressly agreed that "any error in processing

data, preparation or filing of a report, form, or file, or the failure to perform Services as required hereunder *shall be satisfactorily cured* upon the completion of accurate re-processing, the preparation or filing of the accurate report, form, or file, or the re-performance of the Services in accordance with applicable requirements, respectively." *See* PX 1, Agreement § 8.2 (emphasis added).

37. The Agreement includes a Termination Fee Schedule that "shall govern the early termination of this Agreement." *See* PX 1, Agreement § 8.1.

38. The Termination Fee Schedule requires Emigrant to pay a fee to Metavante if Emigrant terminates the Agreement before the end of the Initial Term: "Except as set forth in this Termination Fee Schedule, if Customer [Emigrant] elects to terminate this Agreement or any Service for any reason, Customer [Emigrant] shall pay Metavante the Termination Fee computed in accordance with this Schedule." *See* PX 1, Agreement, Termination Fee Schedule ¶ 1(a).

39. The Termination Fee "shall be an amount equal to eighty percent (80%) of the Estimated Remaining Value of the terminated Services, except as provided in Section 1(b) of th[e] Termination Fee Schedule." *See* PX 1, Agreement, Termination Fee Schedule ¶ 4.

40. Pursuant to Section 1(b) of the Termination Fee Schedule, the Termination Fee "shall be equal to fifty percent (50%) of the Estimated Remaining Value

calculated using a thirty-six (36)-month term," but only if Emigrant proves that it "migrate[d] its data processing for direct banking to an in-house solution during the initial thirty-six (36) months of the Term." *See* PX 1, Agreement, Termination Fee Schedule ¶ 1(b).[1] However, this option in Section 1(b) "shall not apply" if Emigrant "acquires software from another source to replace the Metavante services described in this Agreement and enables it to run in-house." *Id.*

41. The Termination Fee Schedule provides that Emigrant "shall not be obligated to pay Metavante the Termination Fee" only "[i]f Customer [Emigrant] terminates this Agreement in accordance with Sections 8.2 [*i.e.*, termination due to a Default], 8.3 [*i.e.*, termination due to insolvency], or 15.3 [*i.e.*, termination due to a disaster] of the Agreement." *See* PX 1, Agreement, Termination Fee Schedule ¶ 3. This exemption from the Termination Fee does not apply where a party fails to terminate the Agreement "in accordance with Sections 8.2, 8.3, or 15.3 of the Agreement." *Id.*

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1 Under the Agreement, "Estimated Remaining Value" is defined as "the number of calendar months remaining between the Effective Date of Termination and the last day of the contracted-for Term, multiplied by the average of the three (3) highest monthly fees (but in any event no less than the Monthly Base Fee or other monthly minimums) payable by Customer during the twelve (12)-month period prior to the event giving rise to termination rights under this Agreement. . . ." PX 1, Agreement §18.S.

42. The parties agreed that the Termination Fee was reasonable and was not a penalty. Specifically, "Customer [Emigrant] acknowledges that Metavante shall suffer a material adverse impact on its business if this Agreement is terminated prior to expiration of the Term, and that the resulting damages may not be susceptible of precise determination. Customer [Emigrant] acknowledges that the Termination Fee is a reasonable approximation of such damages and shall be deemed to be liquidated damages and not a penalty." *See* PX 1, Agreement § 9.6.

43. The Agreement includes a number of provisions that define the rights and remedies of the parties in the event of a material breach that is not cured. The Agreement explicitly bars certain categories of alleged damages, including (for example) "INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES OF ANY KIND – including lost profits, loss of business, or other economic damage, and further including injury to property." *See* PX 1, Agreement § 9.2. The Agreement also creates exclusive remedies, limits the amount of recoverable damages, and includes other provisions that define available remedies. *See* PX 1, Agreement §§ 4.5(B), 4.6(C), 8.2, 9.2, 9.3, 9.5, 9.7, 16.3, 16.6, 18.L.

44. The Agreement allocates the risks between the parties, and each party accepted that allocation voluntarily. Metavante and Emigrant each expressly "acknowledge[d] that the limitations and exclusions contained in this Agreement *have been the subject of*

active and complete negotiation between the parties and represent the parties' voluntary agreement based upon the level of risk to Customer [Emigrant] and Metavante associated with their respective obligations under this Agreement and the payments to be made to Metavante and the charges to be incurred by Metavante pursuant to this Agreement." *See* PX 1, Agreement § 17.11 (emphasis added).

45. Banking statutes and regulations do not prohibit or prevent overdrafts of savings accounts. (Regulation D, 12 C.F.R. § 204.2; Rulings and Opinions 2-342.19, 2-345.24, 2-342.22, 2-342.13, 2-345.23; 5/13/09 Tr. (Hoover) at 72:11- 73:11). According to Emigrant's own expert, "Regulation D does not say overdrafts [on] savings accounts are prohibited but it defines transaction accounts." (5/7/09 Tr. (Wilson) at 51:16-22).

46. The Agreement provides that Emigrant, not Metavante, "shall be solely responsible for monitoring and interpreting (and for complying with, to the extent such compliance requires no action by Metavante) the Legal Requirements." (PX 1, Agreement § 14.1A; 5/7/09 Tr. (Wilson) at 70:23- 71:15). The Agreement also provides that Emigrant, not Metavante, "shall be responsible for compliance with all applicable laws, rules and regulations regarding Customer's use of and/or access to the ACH Services . . . ." (PX 1, Agreement § 4.6C; 5/7/09 Tr. (Wilson) at 71:16- 72:14).

47. Risk management was the exclusive responsibility of Emigrant. (5/13/09 Tr. (Hoover) at 56:17- 57:2). Emigrant's own risk-assessor, Core-Teck, instructed Emigrant before it entered into the Agreement that "Risk Management is [the] clear and exclusive responsibility of Emigrant." PX 20, at 3.

48. Emigrant was responsible for performing a risk assessment of, and managing any risks associated with, entering into the Agreement. (5/7/09 Tr. (Wilson) at 42:12- 43:10; 5/13/09 Tr. (Hoover) at 56:17-22, 57:3-11, 58:10-21, 61:16-25, 62:9-19; Joint Statement of Undisputed Facts ¶¶ 53-54; PX 191).

49. The elements of a cause of action for breach of contract under Wisconsin law are: (1) the existence of a contractual duty; (2) breach; and (3) damages caused by the breach. *See Matthews v. Wis. Energy Corp.*, 534 F.3d 547, 553 (7th Cir. 2008); *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 801 (W.D. Wis. 2006).

50. Metavante performed Services under the Agreement for Emigrant in April, May, June and July 2006, and Emigrant accepted and used those Services.

51. Under the Agreement, Emigrant had a contractual obligation to pay for the Services provided by Metavante.

52. Emigrant materially breached the Agreement by failing to pay for Services that Metavante performed in April, May, June and July 2006. *See* PX 1, Agreement

§ 8.2 (stating that a failure to pay by Emigrant is a material breach).

53. Emigrant materially breached the Agreement by (i) purporting to terminate the contract on May 3, 2006 in the absence of a material and uncured breach by Metavante; (ii) failing to provide Metavante an opportunity to cure any alleged Default, as required by Section 8.2 of the Agreement; (iii) failing to pay the Termination Fee; (iv) improperly using Metavante's confidential and proprietary information to create the Successor System in violation of Article 13 of the Agreement (PX 1, Agreement §§ 13.2, 13.3, 13.4, 13.6, 18.AA); and (v) failing to protect Metavante's confidential and proprietary information as required by Section 13.4.

54. The processing fees for the Services set forth on Metavante's invoices for April, May, June and July 2006 that remain unpaid by Emigrant total $1,773,641.13.

55. With prejudgment interest through May 18, 2009, Metavante is entitled to damages on the unpaid processing fees totaling $2,019,219.40, plus attorneys' fees, costs, and other amounts as provided under the Agreement. *See* Wis. Stat. § 138.04 (proving for simple 5% prejudgment interest); PX 1, Agreement §§ 5.5, 17.8.

61. Specifically, Emigrant did not terminate the Agreement for Cause in compliance with Section 8.2 of the Agreement.

62. Emigrant did meet its burden of proving that it migrated its data processing for direct banking to an in-house solution by creating its own data processing platform. *See* PX 1, Agreement § 8.1, Termination Fee Schedule ¶ 1(b).

63. Regardless of which party bears the burden of proof, Emigrant did migrate its data processing for direct banking to an in-house solution by creating its own data processing platform. (PX 1, Agreement § 8.1, Termination Fee Schedule 1(b)).

70. Metavante is entitled to recover its "collection fees, court costs, reasonable attorneys' fees, and other fees, costs, and charges incurred by Metavante in collecting payment of the charges and any other amounts for which Customer [Emigrant] is liable under the terms and conditions of this Agreement," as well as its "costs, attorneys' fees actually incurred, and necessary disbursements incurred in connection with such action, as determined by the court." *See* PX 1, Agreement §§ 5.5, 17.8.

71. Emigrant made certain payments to Metavante, subject to an alleged reservation of rights, which include: (1) $2,205,316.24 with an accompanying letter dated November 29, 2005; (2) $266,070.01 with an accompanying letter dated December 7, 2005; (3) $44,640 with an accompanying letter dated December 12, 2005; (4) $45,496.42 with an accompanying letter dated February 16, 2006; (5) $3,655,000 with an

accompanying letter dated April 28, 2006; and (6) $3,783,699.50 with an accompanying letter dated July 14, 2006.

73. On its counterclaim for breach of contract, Emigrant has the burden of proving (1) the existence of a contract; (2) breach; and (3) damages caused by the breach. *See Matthews v. Wis. Energy Corp, Inc.*, 534 F.3d 547, 553 (7th Cir. 2008) (citation omitted); *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 801 (W.D. Wis. 2006) (citation omitted).

74. Emigrant has failed to meet its burden of proving that Emigrant performed its duties under the Agreement.

75. Emigrant cannot bring a breach of contract claim based on alleged duties that do not appear in the Agreement. Emigrant has no breach of contract claim in the absence of a contractual duty found in the Agreement itself.

76. Emigrant has failed to meet its burden of proving that Metavante did not satisfy the Service Levels in the Agreement. *See* PX 1, Agreement, Service Level Schedule.

77. Emigrant has failed to meet its burden of proving that Metavante failed to provide Services in a commercially reasonable manner in material conformance with the applicable Documentation and the Agreement. *See* PX 1, Agreement § 6.1.

78. Emigrant has failed to meet its burden of proving that Metavante failed to perform its material obligations under the Agreement. *See* PX 1, Agreement § 8.2. Metavante did not commit a Default as defined in the Agreement.

79. Emigrant has also failed to meet its burden of proving that Emigrant gave Metavante an opportunity to cure after purporting to terminate the Agreement in its letter dated May 3, 2006. *See* PX 1, Agreement § 8.2. Emigrant cannot terminate the Agreement for Cause and cannot seek Damages because Emigrant did not provide Metavante with an opportunity to cure any alleged Default.

80. Emigrant has failed to meet its burden of proving that Metavante failed to cure an alleged material breach as provided in the Agreement. *See* PX 1, Agreement § 8.2. Metavante cured any alleged material breach before Emigrant sent its termination letter on May 3, 2006.

81. Emigrant has failed to meet its burden of proving that Emigrant suffered damages proximately caused by an alleged material breach by Metavante.

82. The implied covenant of good faith and fair dealing does not apply. The implied covenant of good faith is a rule of construction, and is not a basis for creating rights that do not exist and are not found in the four corners of a contract. *See Didion Milling, Inc. v. Agro Distrib., LLC*, 2007 WL 702808, at *15 (E.D.

Wis. Mar. 2, 2007); *Market Street Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588, 593 (7th Cir. 1991). Metavante did not have an "implied" duty to notify Emigrant when a computer application used to provide Services under the Agreement experienced a problem or issue, nor did Metavante have an "implied" duty to renegotiate monthly processing fees charged to Emigrant.

83. Metavante did not breach any implied covenant of good faith. Metavante performed its contractual obligations in good faith.

84. Emigrant has the burden of proving each of the elements of fraud in the inducement and intentional misrepresentation by clear and convincing evidence. *See Walker v. O'Brien*, 2002 WI App 1, ¶ 12, 249 Wis. 2d 488, 639 N.W.2d 223; *St. Pierre v. Logcrafters, LLC*, 2000 WI 161, ¶ 22, 238 Wis. 2d 94, 617 N.W.2d 677.

85. The elements of a cause of action for fraud in the inducement and for intentional misrepresentation are: (1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on that statement to its detriment. *See Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 12, 283 Wis. 2d 555, 699 N.W.2d 205.

86. A claim of fraud in the inducement also requires the claimant to prove that the alleged misrepresentation occurred before contract formation. *Id.* at ¶ 30.

87. An alleged misrepresentation must relate to present or pre-existing facts, not statements of opinion, promises of future performance, or predictions of future events. *See Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶¶ 41-45, 270 Wis. 2d 146, 677 N.W.2d 233; *St. Pierre v. Logcrafters, LLC*, 2000 WI App 161, ¶ 24, 238 Wis. 2d 94, 617 N.W.2d 677; *Consolidated Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis. 2d 589, 594, 451 N.W.2d 456, 459 (Wis. Ct. App. 1989).

88. A statement of fact cannot provide the basis for a claim unless the statement was material. *See Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 13, 283 Wis. 2d 555, 699 N.W.2d 205.

89. A claimant has no claim unless it proves that reliance was reasonable and justifiable. *See Gharibeh v. Kim*, 2004 WI App 88, ¶ 8, 272 Wis. 2d 856, 679 N.W.2d 927; *Walker v. O'Brien*, 2002 WI App 1, ¶ 14, 249 Wis. 2d 488, 639 N.W.2d 223; *Lambert v. Hein*, 218 Wis. 2d 712, 582 N.W.2d 84; *St. Pierre v. Logcrafters, LLC*, 2000 WI App 161, ¶ 28, 238 Wis. 2d 94, 617 N.W.2d 677.

90. Emigrant has failed to meet its burden of proving by clear and convincing evidence any, let alone all, of the elements of fraud in the inducement and intentional misrepresentation.

91. Emigrant has failed to meet its burden of proving that Metavante made representations of fact.

92. Emigrant has failed to meet its burden of proving that the statements allegedly made by Metavante were both false and material.

93. Emigrant has failed to meet its burden of proving that Metavante made representations knowing that they were untrue, or made representations recklessly without caring whether they were true or false.

94. Emigrant has failed to meet its burden of proving that Metavante made representations with the intent to defraud and to induce Emigrant to act upon them.

95. Emigrant has failed to meet its burden of proving that Emigrant believed the alleged statements to be true and justifiably relied on them to its detriment.

96. Emigrant has failed to meet its burden of proving that Emigrant suffered any damages proximately caused by Metavante.

97. Emigrant has failed to meet its burden of proving that Metavante made misrepresentations to Emigrant before entering into the Agreement.

98. Both before and during the Agreement, Emigrant had knowledge and was aware of the facts and circumstances that form the basis of its claims for fraud

in the inducement and intentional misrepresentation, and thus cannot prove those claims, let alone by clear and convincing evidence. *See Kanack v. Kremski*, 291 N.W.2d 864, 867 (Wis. 1980); *Dexter Corp. v. Whittaker Corp.*, 926 F.2d 617, 620 (7th Cir. 1991) ("[A]n ostrich can hardly be said to *rely* on there being no danger in the vicinity.") (emphasis in original).

99. Emigrant could not and did not justifiably rely on statements allegedly made by Metavante in preliminary proposals and introductory meetings five months before execution of a heavily negotiated contract. The parties spent months negotiating the precise terms of the business relationship, and did so with the benefit of counsel. (Joint Statement of Undisputed Facts ¶¶ 25-36). As a matter of law, Emigrant cannot justifiably rely on general statements in introductory presentations in light of the months of careful negotiations between the parties about their respective rights and remedies in an Agreement spanning dozens of pages.

100. Emigrant could not and did not justifiably rely on statements allegedly made by Metavante during negotiations before contract formation because Emigrant disregarded a warning by Core-Teck to negotiate for different provisions relating to Metavante's performance and the identification of services to be performed. As a matter of law, Emigrant could not rely on Metavante's alleged statements when Emigrant disregarded warnings to negotiate for specific and different provisions.

101. Emigrant's claims of fraud in the inducement and intentional misrepresentation fail to the extent that they rest on any alleged statement that the system would provide all of the services required by Emigrant (such as alleged scalability) and would provide similar functionality as the system offered by ING Direct. During negotiations, Emigrant requested – and Metavante specifically rejected – proposed representations and warranties ("proposed new clause C") that Metavante's Services would "constitute all of the services . . . reasonably required for Customer [Emigrant] to achieve its overall business purpose, namely, to provide commercially viable and scalable national online Electronic Banking Services," and would provide "similar functionality, efficiency, capacity and reliability as those national online services currently offered by ING Direct." *See* Findings of Fact ¶¶ 17-23, *supra.* No such representations, warranties or terms appear in the Agreement.

102. Emigrant could not and did not justifiably rely on any alleged representations that Metavante would provide "all of the services" Emigrant needed, and that Metavante's system would be similar to the system offered by ING Direct. Emigrant knew that Metavante had rejected such an express representation, warranty and term under the Agreement during contract negotiations. *See* Findings of Fact ¶¶ 17-23, *supra.* Emigrant could not and did not justifiably rely on any alleged representation that is not found in, or is inconsistent with, the terms of the Agreement.

Appendix D

103. Emigrant has not proved the fact of damage.

104. Emigrant has not proved any nexus between alleged liability and its claimed damages.

105. Emigrant has not proved causation for any alleged damages.

106. Emigrant is not entitled to any relief whatsoever.

107. Various risk management procedures and guidelines impacted Emigrant's ability to invest EmigrantDirect deposits into long-term higher yielding investments. *See* FDIC Risk Management Manual of Examination Policies, Board of Governors of the Federal Reserve System Supervisory Letter 96-38 (Sup.).

APPENDIX E — RULE 702 OF THE FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.